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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

DALGETY FOODS, INC.,

Appellant,

vs.

ANGELINA AVINA,

Appellee.

On Appeal from a Judgment of the Court of Appeal of the State of California in Case No. A020025 (California Workers' Compensation Appeals Board Case Nos. 76 SAL 8071 and 77 SAL 9360)

APPELLANT'S JURISDICTIONAL STATEMENT

GEORGE J. TICHY, II, ESQ.
MICHAEL B. MARGOLIS, ESQ.
Counsel of Record
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
1925 Century Park East
Suite 850
Los Angeles, CA 90067
(213) 553-0308
Attorneys for Appellant

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented

1. Does federal law invalidate a state statute which, as applied, disregards a dispositive factual finding previously rendered in arbitration proceedings under a collective bargaining agreement?

2. Does federal law preempt a state statute which, as applied, nullifies the results of collective bargaining by refusing to honor a prior and valid arbitration decision?

3. Does federal law preempt a state workers' compensation statute which, as applied, imposes criminal and civil liability on an employer for conduct which the National Labor Relations Board, but not the Federal Courts of Appeals, would deem prohibited or protected by the National Labor Relations Act?

4. Did the Supreme Court of California deny Appellant the due process guaranteed by the Fourteenth Amendment to the United States Constitution when it reversed a lower court's decision without permitting Appellant to oppose the appeal?

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October Term, 1982

DALGETY FOODS, INC.,

Appellant,

vs.

ANGELINA AVINA,

Appellee.

APPELLANT'S JURISDICTIONAL STATEMENT

I
JURISDICTION

Dalgety Foods, Inc. ("Appellant") appeals from the California Court of Appeal's denial of Appellant's petition for writ of review with respect to an order of the California Workers' Compensation Appeals Board ("Appeals Board") holding that Appellant violated California Labor Code Section 132a ("Section 132a") by discharging Angelina Avina ("Appellee").[1] The Court of Appeal's order was filed on January 10, 1983.[2] The California Supreme Court denied Appellant's petition for a hearing on February 9, 1983. On April 27, 1983, Appellant filed a notice of appeal with both the California Court of Appeal and the California Workers' Compensation Appeals Board. On April 29, 1983, the Honorable Justice William H. Rehnquist extended the time for docketing this appeal to and including June 23, 1983.

Jurisdiction of this appeal is grounded on 28 U.S.C. § 2101(c) and 28 U.S.C. § 1257(2).[3] Appellate jurisdiction

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[1]Pursuant to this Court's Rule 28.1, Appellant states that it has no affiliates or subsidiaries that are not wholly owned; Appellant is itself wholly owned by Dalgety PLC (U.K.). Because this Court in another context has noted the identity of a non-party source of financing for litigation, *see Montana v. United States*, 440 U.S. 147, 151, 154 (1979), Appellant wishes to advise the Court that it brings this appeal with financial assistance from The Pacific Telephone and Telegraph Company, which possesses no control over the conduct of this litigation but has expressed an interest in the outcome of the appeal.

Pursuant to this Court's Rule 15.1(b), Appellant states that the following were parties below: Appellant, Appellee, the California Workers' Compensation Appeals Board, the Hartford Accident and Indemnity Company, the Mission Insurance Company, and the State Compensation Insurance Fund. Appellant notified the Clerk by letter dated April 27, 1983 that it believes that, of the parties below, only Appellant and Appellee retain an interest in the outcome of this appeal. *See* Supreme Court Rule 10.4.

Pursuant to Rule 28.4(c) of this Court, Appellant states that 28 U.S.C. § 2403(b) may be applicable and that this document has been served upon the Attorney General of the State of California.

[2]*See* 48 Cal. Comp. Cases 25 (1983).

[3]Appellant's fourth question, whether the California Supreme Court violated Appellant's right to due process, does not satisfy the jurisdictional prerequisites for a direct appeal. Appellant asks this Court to accept review of that question as if it were presented in a petition for certiorari under 28 U.S.C. § 1257(3). *See Flournoy v. Wiener*, 321 U.S. 253 (1944); *cf.* 28 U.S.C. § 2103 (improvident appeal to be treated as petition for certiorari).

lies under 28 U.S.C. § 1257(2) where a state court holds a state statute "applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979); *see, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 79-80 (1980). The federal challenge must explicitly address a specific state statute, *e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n.4 (1980), so that the state courts have a proper record and a fair opportunity to reconcile the statute with the claim of invalidity, *see Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

The present appeal easily meets both the terms and the aims of 28 U.S.C. § 1257(2). Appellant argued throughout the Section 132a proceedings below that, since a labor arbitrator had ruled that Appellant discharged Appellee solely because her continued employment presented a safety risk, *see* 6, *infra*, the doctrines of federal preemption and collateral estoppel blocked Appellee's Section 132a claim. At the trial level, the Workers' Compensation Judge explicitly acknowledged that Appellant challenged the constitutionality of Section 132a as applied. Appendix H at 175; *see* Appendices L at 222, CC at 392. The Appeals Board, too, recognized that Appellant claimed a conflict between Section 132a and federal law. Appendix DD at 401. Appellee herself founded her counter-argument on the constitutional relationship of the preemption and collateral estoppel defenses. Appendix M at 224, 233; *see* Appendix S at 367.

At no point below did any party, agency, judge, or court claim that Appellant's federal-law challenges had not properly been presented. Despite the state courts' failure expressly to address the issue, therefore, Appellant's preemption and collateral estoppel contentions are properly before this Court. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973).

II
CONSTITUTIONAL PROVISIONS AND LAWS INVOLVED

A. United States Constitution, Article VI, Section 2.

This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made, under the authority of the United States, shall be the Supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

B. United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

C. California Labor Code, Section 132a.

It is the declared policy of this State that there should not be discrimination against workers who are injured in the course and scope of their employment.

(1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because the latter has filed or made known his intention to file an application with the appeals board, or because the employee has received a rating, award or settlement, is guilty of a misdemeanor and subject to the provisions of Section 4553. Any such employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.

(2) Any insurance carrier who advises, directs or threatens an insured under penalty of cancellation or a

raise in premium or for any other reason, to discharge an employee because the latter has filed or made known his intention to file an application with the appeals board, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and subject to the provisions of Section 4553.

(3) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because the employee testified or made known his intention to testify in another employee's case before the appeals board is guilty of a misdemeanor, and the employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.

(4) Any insurance carrier who advises, directs or threatens an insured under penalty of cancellation or a raise in premium or for any other reason, to discharge or in any manner discriminate against an employee because the employee testified or made known his intention to testify in another employee's case before the appeals board is guilty of a misdemeanor.

Proceedings under this section for increased compensation as provided in Section 4553, or for reinstatement and reimbursement for lost wages and work benefits, are to be instituted by filing an appropriate petition with the appeals board, but such proceedings may not be commenced more than one year from the discriminatory act or date of termination of the employee. The appeals board is vested with full power, authority, and jurisdiction to try and determine a misdemeanor charge. The appeals board may refer and any worker may complain of suspected violations of criminal misdeameanor provisions of this section to the Division of Labor Standards Enforcement, or directly to the office of the public prosecutor.

III
STATEMENT OF THE CASE

Appellee once worked at Appellant's frozen-food manufacturing plant in Salinas, California. The terms of her employment were set forth in a collective bargaining agree-

ment between Appellant and Teamsters Local 890 ("Union"). Included among those terms were a mandatory grievance-arbitration procedure covering "any difference or issue between an employee or the Union and the Employer arising out of the application or interpretation of any provision of this Agreement", Appendix A at 26, a provision allowing discharge "for cause", *id* at 21, and a prohibition against discrimination based on "race, color, sex, religious creed, age, national origin, or handicap, as provided in the appropriate State and Federal laws", *id* at 3; *see id.* at 5.

On September 12, 1979, Appellant discharged Appellee. The written notice of termination informed Appellee that Appellant "deem[ed] it impossible to fulfill its obligation to protect you on the job and finds the burden of liability unreasonable, in view of your history of accidental injury on the job and in light of a sixty-two percent (62%) permanent disability award granted by the Workers' Compensation Appeals Board." *See* Appendix C at 105. Appellee challenged the discharge and ultimately pressed her grievance to arbitration.

At the arbitration hearing on October 26, 1979, battle was joined on two issues: Appellant's true motives and the existence of a safety risk. Appellant maintained that it had discharged Appellee solely because, as a result of her long history of industrial and non-industrial accidents, she labored under physical disabilities which made her continued employment unsafe both to herself and to her coworkers.[4] Appellee replied that the medical evidence showed that she was perfectly able to work and that the termination letter betrayed Appellant's real intention: to eliminate a potential

[4]The partial transcript of the arbitration hearing shows that Appellant articulated this position in its opening statement, *see* Appendix D at 109; Appellant's post-hearing brief expands on the theme, *see* Appendix F.

workers' compensation claimant.[5]

The parties were unable to agree upon a statement of the issues for arbitration which would reflect the substance of the dispute, *see* Appendix D at 109; they compromised with the factually neutral question "whether or not the grievant, in this case Angelina Avina, was discharged for cause within the meaning of the Collective Bargaining Agreement." *Id.* at 111.

The arbitrator took sworn testimony throughout the day, accepted post-hearing briefs in December 1979, and upheld the discharge in a decision issued on January 16, 1980, *see* Appendix G. The decision rested on two factual findings: (1) Appellant's sole reason for discharging Appellee was its concern about safety and (2) Appellee's continued employment would in fact have presented an undue safety risk.[6]

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[5]The Union's opening remarks sketched these points, *see* Appendix D at 109-10; the post-hearing brief amplified them and explicitly characterized the discharge as unlawful discrimination:

> The company basis [sic] its sole position on the fact that [Appellee] has a possibility of becomming [sic] involved in a future workers' compensation claim by being somewhat more prone to injury in certain areas of her body due to her prior history of injury, than possibly other workers. This, in the Union's opinion, is not cause, just or otherwise, indeed, no cause at all, for termination. It is rather discrimination. In both instances Section 13 [just-cause provision] and Section 2 [antidiscrimination provision] of the contract are violated.

Appendix E at 117. Thus, Appellee argued to the arbitrator that the discharge constituted precisely the sort of discrimination prohibited by Section 132a.

[6]Appellee may now want to dispute that the arbitrator made these findings, but Appellee has surely waived the point. Appellant identified the arbitrator's factual findings at the trial level below and Appellee did not dispute the point then; Appellant consistently asserted the same position in the many subsequent briefs and petitions without drawing Appellee's objection. *Compare, e.g.* Appendix K at 196 (Appellant's first petition for reconsideration to the Appeals Board) *with* Appendix M (Appellee's answer to that petition); Appendix R at 299 (Appellant's opposition to Appellee's petition for writ of review to the Court of Appeal) *with* Appendix S (Appellee's reply brief). In fact, every brief filed by Appellant below repeated this contention, yet Appellee did not dispute it until her November 1982 brief in opposition to Appellant's last request for writ of review (from the denial of which Appellant takes this appeal). As Appellant pointed out in its December 1982 reply, that was too late to raise a completely new theory.

Appellee sought no judicial review.[7]

Four days *before* the arbitration hearing, Appellee filed civil and criminal claims under Section 132a, which prohibits employment discrimination in retaliation for an employee's having sought or received workers' compensation benefits.[8] At the Section 132a hearing held on February 5, 1981 before Workers' Compensation Judge William C. Butler, the parties adduced evidence virtually identical to that which had been presented at the arbitration. There were two salient exceptions: first, Appellant introduced the record of the arbitration; second, Appellee testified that on May 5, 1980 — some eight months after her discharge — she began

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The arbitrator made no formal findings of fact. But the arbitrator's written opinion, in light of the evidence and argument submitted to him, strongly supports Appellant's position. As to Appellant's motive for discharging Appellee, the arbitrator wrote in part:

> The termination . . . followed the receipt of certain medical information by the Company, which, to them, seemed to indicate that her continued employment might represent a dangerous situation to her and, perhaps, to her fellow employees.

Appendix G at 158. Throughout his decision the arbitrator explored the extent to which a safety risk really existed, for example:

> Is the grievant motivated, or driven, by economic necessity, or by confidence in his [sic] physical ability to consistently perform the task at hand in an acceptable manner? The amount of the Workers' Compensation Award, the communications and testimony of Dr. Storey and the lawyer for Dr. Dohn served to indicate the severity of the injury to which they were addressing themselves. The history of other injuries served to emphasize the cumulative effect of these injuries, and taken in combination with the record, indicates a strong possibility of future injuries unless Ms. Avina conducts herself very, very carefully and does not get involved in a hazardous environment.

Id. at 161-162.

[7]In the arbitration, the parties enjoyed a full and fair opportunity and incentive to litigate. *See* Appendix G at 157. Appellee has never contended that the arbitration was not procedurally fair.

[8]The Section 132a claims were filed on Appellee's behalf by the same law firm which represented the Union in the arbitration proceeding. Both claims recited that a grievance had been filed and that Appellee had demanded reinstatement "through her union business representative". Appendices B at 95, C at 102. The criminal claim asked that "this matter be referred to the Division of Labor Standards and Enforcement for prosecution under the criminal misdemeanor provisions of Labor Code § 132a . . . ." Appendix C at 102.

working at a different food production plant and continued to work for several months with only one minor accident.

At the completion of Appellee's case in chief, Appellant made an oral motion to dismiss on several grounds. *See* Appendix H at 174-75. First, Appellant argued that, because Appellee had already unsuccessfully sought relief from the discharge through the collectively bargained arbitration process and had not appealed from the adverse arbitration decision, the Section 132a claim should be dismissed. Judge Butler responded that dismissal was inappropriate and that he was obliged to render a decision on the merits. Appellant next argued that the matter was preempted by federal law because the subject of the dispute had already been resolved through the collective bargaining process. Judge Butler denied the preemption defense without addressing its merits on the ground that "this Board, under the California State Constitution, cannot rule on the constitutionality of the acts vesting jurisdiction in the Board". *Id.* at 175. Appellant's third point was that the arbitration decision precluded the Section 132a claim. Judge Butler disagreed on the ground that the issues in the two proceedings were different. Finally, Appellant argued that the discrimination claim should be dismissed because the arbitrator's factual findings were collateral estoppel on the dispositive factual issues in the Section 132a proceedings. Judge Butler indicated that he was "concerned" about that possibility and would defer ruling on that motion. *Id.* at 175.

At the end of the Section 132a hearing, Judge Butler stated that he did not wish the parties to submit briefs. Appellant subsequently wrote a letter requesting him to reconsider and outlining the areas that Appellant wished to brief, including the preemption and collateral estoppel defenses. The request was not granted. *See* Appendix J at 186.

On March 3, 1981, Judge Butler ruled that Appellant had violated Section 132a by discharging Appellee. The decision rested on two factual findings: (1) Appellant's sole reason

for discharging Appellee was to avoid future injury to her or her coworkers, and thus Appellant had no discriminatory or unlawful motive, Appendix J at 186, but (2) Appellant was wrong to judge that Appellee's continued employment would present an undue safety risk, *id.* at 185. That is, Judge Butler agreed with the arbitrator as to Appellant's motives but disagreed about the safety risk, observing that Appellee "demonstrated by the fact of her return to work for several months [at a job similar to that which she had had with Appellant] that she was capable of performing her work." *Id.* Judge Butler ruled that, even though Appellant harbored no unlawful motive, Appellant's mistake about the safety risk brought the discharge within Section 132a's reach.

With regard to the preclusive effect of the arbitration award, Judge Butler ruled as follows:

> As to the impact of the grievance procedure and arbitration, the position of the Defendant that as to factual matters, the doctrine of collateral estoppel applies, they are correct, but as to the question of demonstration before the Board, that she could have returned to work and performed her job without risk of future injury or re-injury, that issue was not before the arbitrator. The only issue there was, was the determination of whether or not there was a violation of the collective bargaining agreement. There was found to be none.
>
> There was no determination made of whether or not the discharge was in violation of Labor Code 132(a) nor could there be.

Id. Judge Butler evidently found it unnecessary to distinguish between collateral estoppel and res judicata.

Appellant petitioned the Appeals Board for reconsideration on a number of grounds: that the absence of a discriminatory motive precluded a finding of discrimination, that Section 132a was preempted because of the arbitration award, that collateral estoppel and res judicata precluded Appellee's claim, and that Judge Butler improperly evaluated Appellee's ability to work safely on the basis of events

occurring long after the discharge.[9] Appendix K. Judge Butler filed an obligatory report and recommendation regarding Appellant's petition. Appendix L. In that report, Judge Butler discussed whether a discriminatory motive was necessary for a finding of violation and repeated his belief that he was jurisdictionally unable to rule on the preemption issue. Judge Butler also addressed the preclusion defenses, again without distinguishing between res judicata and collateral estoppel:

> With respect to the effect of the arbitration proceeding, and the assertion that res judicata applies, I believe petitioner is in error. First, the parties are not the same. The parties to an arbitration are the Union and the Employer. The employee is a beneficiary of such action but is not a party.
>
> Secondly, the issue before the arbitrator clearly differed from that before me. The contract was violated, if at all, at the time of the discharge. No question was before the arbitrator as to the applicants right, under "Western Electric" [*Western Electric Co. v. Workers' Compensation Appeals Board*, 99 Cal. App. 3d 629, 160 Cal. Rptr. 436 (1979)] to demonstrate after the fact, that she could do the work. The only apparent issue before the arbitrator was whether or not Dalgety discharged her for the reasons stated, and were those reasons valid under the contract with the Union.[10]
>
> Thirdly, the arbitration decision is not a decision of a Court of Record.

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[9]Both Appellant and Judge Butler were surprised at how quickly Appellee recovered from purportedly permanent disabilities once she had settled her workers' compensation disability claim for some $22,000. *See* Appendix J at 187.

[10]Judge Butler attempts here to distinguish his issue from the arbitrator's. Apparently Judge Butler contends that the safety issue in the arbitration is different from the safety issue in the Section 132a proceedings because the hearings were held months apart and, by the time Judge Butler held *his* hearing, Appellee had shown she could in fact work safely. Thus Judge Butler would transform what is at most newly discovered evidence into a separate factual issue for purposes of the preclusion doctrines. Neither the Appeals Board nor the courts below adopted Judge Butler's view.

Appendix L at 221-22.

Appellee opposed Appellant's preemption and preclusion contentions with the following argument:

> Labor Code §132(a) sets forth a broad prohibition of discrimination against employees who have sustained industrial injuries. Section 132(a) is essential to the protection of injured workers and the integrity of the Workers' Compensation Act. *Judson Steel vs. WCAB, Maese*, (1978), 43 CCC 1205.
>
> The validity and constitutionality of the compensation act has long been established. *Western Ind. Co. vs. Pillsbury*, (1915) 170 C 686; *Nelson vs. Metalclad Insulation Corp.*, (1975), 44 Cal.App.3d 474; 81 Am.Jur.2d. *Workmen's Compensation*, § 10, et. seq. The power of the states to regulate and enact workers' compensation laws being well established, there is no merit to the employer's federal pre-emption argument, nor are the cases cited by defendant on point. The *Oliver* [*Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959)] and *Morton* [*Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964)] cases cited by the employer involved situations in which state law was being invoked to the unfair advantage of employers in an economic struggle against unions; there is nothing in those cases to even remotely suggest that federal law prohibits the states from protecting industrially injured individuals from discrimination.
>
> The gist of the employer's pre-emption argument — variously raised elsewhere in the petition under the labels "res judicata" and "collateral estoppel" — is that the employer's firing of Ms. Avina was not found to be violative of the collective bargaining agreement and therefore should not be found violative of Labor Code § 132(a). However, the [California] Supreme Court clearly stated in *Judson Steel* [v. *Workers' Compensation Appeals Board*, 22 Cal. 3d 658, 150 Cal. Rptr. 250 (1979)] that compliance with a collective bargaining agreement is not a defense to 132(a):

> "[A]n employer may not defend a discriminatory employment practice proscribed by § 132(a), on the basis of the provisions of a collective bargaining agreement, for a union may no more bargain away its members' statutory rights against discrimination under the workers' compensation laws than it may bargain away its members' statutory rights against, for example, sexual or racial discrimination." *Judson Steel*, supra.

Appendix M at 232-33.

On May 29, 1981, the Appeals Board reversed Judge Butler's decision on the basis of the first defense, absence of discriminatory motive, without reaching the others:

> [T]he record reveals that the workers' compensation judge was convinced that, in effect, the "true reason" for the discharge was the employer's belief albeit possibly mistaken that re-injury or further injury would result from continued work. That being the case, a Labor Code Section 132a violation should not have been found.

Appendix N at 242.

Appellee petitioned for reconsideration of that decision, arguing that Section 132a was violated even though Appellant harbored no discriminatory motive. Appellee did not discuss the preemption, collateral estoppel, or res judicata defenses, presumably because the adverse decision of the Appeals Board had not addressed those issues. *See* Appendix O.

The Appeals Board refused reconsideration. Appendix P. Appellee petitioned the California Court of Appeal for a writ of review, again arguing that, because the Workers' Compensation Judge had found no safety risk, the discharge violated Section 132a. Appendix Q. Appellant answered that argument and added the preemption and collateral estoppel defenses arising from the arbitration award. Appen-

dix R.[11] In her reply brief, Appellee responded to these affirmative defenses with the same cursory remarks that she had made in her answer to Appellant's earlier, successful petition for reconsideration. *Compare* Appendix S at 367-69 *with* Appendix M at 232-33. The Court of Appeal denied Appellee's petition. Appendix T.

On December 2, 1981, Appellee petitioned the California Supreme Court for a hearing. Appendix MM. The Supreme Court reversed the Court of Appeal on December 23. Appendix U.[12] Obeying the Supreme Court's mandate, which cited *Western Electric Co. v. Workers' Compensation Appeals Board, supra*, the Court of Appeal issued a writ of review. Appendix W; *see also* Appendices V & X.

Relying on *Western Electric*, the Court of Appeal reversed the Workers' Compensation Appeals Board's decision favoring Appellant. In an unpublished opinion dated March 25, 1982, the Court of Appeal ruled that Appellant

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[11]Appellant relegated its res judicata argument to a footnote, *id.* at 316 n.3, in the hope that the Court of Appeal, unlike the Workers' Compensation Judge, would not confuse res judicata with collateral estoppel and apply the wrong test. These preemption and preclusion arguments were probably unnecessary in view of the procedural posture of the case, but Appellant raised them anyway to forestall any subsequent argument that they had not been preserved.

[12]Appellant received no copy of Appellee's petition until after the California Supreme Court granted it. On December 18, 1981, Appellant's counsel accidentally learned from the Workers' Compensation Judge that the petition had been filed. He asked Appellee's attorney to send a copy immediately and contacted the clerk of the California Supreme Court to request that the court delay its decision so as to allow time for Appellant to receive, review, and respond to Appellee's petition. Neither request met with success. After the California Supreme Court's adverse decision, Appellant petitioned for rehearing on the ground that it had been denied procedural due process inasmuch as it had not had an opportunity to respond to Appellee's petition. Appellant's attorney still had received no copy, but a clerk of the California Supreme Court read the contents of Appellee's petition over the telephone and Appellant's counsel prepared the petition for rehearing on the basis of that conversation. (This unpleasant story is told more fully in the petition for rehearing itself, Appendix NN hereto.) The California Supreme Court refused to accept Appellant's petition even for filing on the ground that, once it issued its mandate to the Court of Appeal, it lost jurisdiction over the matter.

had violated Section 132a because Appellee's continued employment presented no safety risk:

> We conclude that the [appeals] board has concentrated on one paragraph of the Western Electric case and ignored the paragraph which follows, which reads: "However, *if Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself*, then the Board could properly draw an inference of prohibited discriminatory action by Western, unless Western can otherwise demonstrate to the contrary." (*Western Electric Co. v. Workers' Comp. Appeals Bd., supra*, p. 645; see also *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 665.)
>
> The rule of section 3202 that Workers' Compensation laws are to be construed " 'liberally . . . with the purpose of extending their benefits for the protection of persons injured in the course of their employment' " applies. (*Judson Steel Corp. v. Workers' Comp. Appeals Bd., supra*, p. 668.) Although section 132a does not compel an employer to ignore the realities of doing business by "reemploying" unqualified employees or employees for whom positions are no longer available, petitioner [Appellee], by returning to work and working for over four months without further injury,[13] demonstrated that, despite her industrial injury, she remained competent to perform her job; and respondent employer did not demonstrate to the contrary.

Appendix Y at 384 (emphasis in original).

Thus, the factual issue of whether Appellee's continued employment presented a real safety risk — precisely the

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[13]The return to work mentioned here is Appellee's brief stint as a lettuce trimmer at another food production company following some eight months of recuperation. What the Court of Appeal omits is that Appellee stopped working at that other employer when she suffered an industrial injury which temporarily disabled her. Appellee herself testified to these facts and Judge Butler specifically mentioned them in his report. *See* Appendix H at 173-74. The Court of Appeal somehow overlooked them.

issue which the arbitrator had resolved in Appellant's favor — was dispositive of the appeal.

Upon Appellant's petition for rehearing, the Court of Appeal modified its opinion by adding the following footnote to the end of the unpublished opinion:

> "In ruling upon a claim that an employer's conduct violated Section 132a, neither the board nor this court is bound by a decision of a labor arbitrator that the employer's conduct did not violate the Union contract. (See *Judson Steel Corp. v. Workers' Comp. Appeals Bd., supra*, p. 665, fn. 5.)"

Appendix Z.

The California Supreme Court denied Appellant's request for review, Appendix AA, and the case returned to the Appeals Board, which reinstated the Workers' Compensation Judge's decision, *see* Appendix BB. Appellant petitioned for reconsideration on the ground that, due to the procedural posture of the case, its preemption and collateral estoppel arguments had never been ruled on. In his report on Appellant's petition, the Workers' Compensation Judge agreed that "[t]he Petition goes to certain limited issues as to which there has been no judicial determination due to the procedural path and the limitation of review", Appendix CC at 392, and then analyzed the issues:

> The issue of federal pre-emption was raised in a timely manner and preserved. I specifically made no finding on this subject, believing it to be beyond the appropriate jurisdiction of the Board at trial level. It appears to have been raised and either not ruled on or mooted at each subsequent stage of the proceedings and has been briefed in full.
>
> The issue of collateral estoppel, I did resolve against Defendants on the following grounds:
>
> (a) non-identity of parties. The parties to an arbitration and grievance are the contracting parties, in this case, the union and the employer and the individual employee is not a party. (However, the "action" is

maintained for her benefit).

(b) Non-identity of issues, under the ruling of arbitrator, the good faith of Defendants at the time of the discharge was a defense.

(c) The ruling in Western Electric that applicant could show by subsequent events that there was no unreasonable risk of harm.

Id. at 392-93.[14]

The Appeals Board denied reconsideration, addressing the collateral estoppel and preemption defenses on the merits. Appendix DD. As to collateral estoppel, the Appeals Board adopted portions of the Workers' Compensation Judge's analysis, including his changes of position, his confusion between collateral estoppel and res judicata, and his misunderstanding of what issues were before the arbitrator, and concluded that:

> [T]he workers' compensation judge was justified in finding that at the time of the discharge there was work available which applicant could have performed without risk of either re-injury or further injury, and that the workers' compensation judge's determination to that effect was not collaterally estopped by reason of the arbitrator's previous determination (see *De Coult v. Beckman Instruments, Inc.* (1973), 38 CCC 383, 387-388).

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[14]Judge Butler is wrong to characterize these as the grounds on which he resolved the collateral estoppel issue against Appellant. When he ruled on the issue, Judge Butler held that the doctrine of collateral estoppel *did* apply to the effect of the arbitration on the Section 132a proceedings. It was only because the arbitrator had not ruled on whether Section 132a (rather than the collective bargaining agreement) had been violated that Judge Butler found that the arbitration award did not bar the Section 132a suit. *See* 9, *supra*. Judge Butler therefore must be referring not to his original decision but instead to his subsequent report on Appellant's initial petition for reconsideration. *See* 10, *supra*. Even so, Judge Butler's summary is inaccurate: newly omitted is his remark about an arbitrator not being a "Court of Record"; newly included is the suggestion that he read the arbitrator's decision as holding that Appellant's good faith was a defense to the grievance. *Compare* 9, *supra*, *with* 10 *supra*.

Id. at 399.[15]

As to preemption, the Appeals Board stated:

We have reviewed the cases cited by petitioner in support of its preemption argument. We find these cases to be distinguishable from the matter herein. The Labor Code Section 132a prohibition of discrimination by reason of industrial injury is not in conflict with the National Labor Relations Act directive whereby resolution of discharge cases may be provided for by collective bargaining agreements. This is not a strike case, and our disposition need not address matters of union activity. Moreover, in the Answer (dated May 26, 1981) to defendant's earlier petition, applicant's attorney urged as follows:

". . . The power of the states to regulate and enact workers' compensation laws being well established, there is no merit to the employer's federal preemption argument, nor are the cases cited by defendant on point. . . .

". . . The gist of the employer's pre-emption argument — variously raised elsewhere in the petition under the labels 'res judicata' and 'collateral estoppel' — is that the employer's firing of Ms. Avina was not found to be violative of the collective bargaining agreement and therefore should not be found violative of Labor Code Section 132a. However, the Supreme Court clearly stated in *Judson Steel* that compliance with a collective bargaining agreement is not a defense to 132a:

" 'A employer may not defend a discriminatory employment practice, prescribed [sic] by Section 132a, on the basis of the provisions of a collective bargaining agreement, for a union may no more bargain

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[15]Despite Judge Butler's earlier attempt to establish that he was obligated to evaluate the safety risk at the time of the Section 132a hearing, *see* note 10 and accompanying text, *supra*, the Appeals Board characterized Judge Butler's ruling as a determination of the safety risk "at the time of the discharge". *Id.*

> away its members' statutory rights against, for example, sexual or racial discrimination.' *Judson Steel, supra.*"

We agree with applicant's attorney. We are persuaded that defendant's preemption argument is without merit. *Id.* at 401-402.

Appellant unsuccessfully petitioned the Court of Appeal for a writ of review, *see* Appendix EE, and then petitioned the California Supreme Court for a hearing, *see* Appendix FF. In the latter petition, Appellant augmented its preemption defense by referring to three recent decisions of the National Labor Relations Board ("NLRB")[16] which suggested that, at least in the context of a collective bargaining relationship, actions which would violate a statute such as Section 132a might also violate Section 8(a)(1) of the National Labor Relations Act.[17] Shortly before Appellee filed an answer to the petition, *see* Appendix GG, the California Supreme Court asked Appellant's attorney for copies of the three new NLRB decisions, which Appellant provided. *See* Appendix HH. Despite this promising interest, on February 29, 1983 the California Supreme Court denied Appellant's request for a hearing. Appendix II.

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[16] *Farrens Tree Surgeons, Inc.*, 264 N.L.R.B. No. 90 (September 30, 1982); *Grumman Flexible Cororation*, 264 N.L.R.B. No. 34 (September 28, 1982); *Ohio Brass Company*, 261 N.L.R.B. No. 18 (April 13, 1982).

[17] Section 8(a)(1) of that Act provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7". 29 U.S.C. § 158(a)(1). Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Id. § 157.

Appellant filed its notice of appeal on April 27, 1983 with the Appeals Board and the California Court of Appeal. *See* Appendices JJ & KK. On April 29, the Honorable Justice William H. Rehnquist extended the time for docketing this appeal through June 23, 1983. Appendix LL.

IV
THE QUESTIONS ARE SUBSTANTIAL

A. Federal Law Requires that the Arbitration Award Be Given Preclusive Effect in the Subsequent Section 132a Proceedings.

Federal law favors the settlement of industrial disputes through final and binding arbitration. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *see* 29 U.S.C. § 173(d). It is equally axiomatic that, as to enforcement of a collectively bargained arbitration agreement, federal law governs over inconsistent state law. *E.g., Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

Despite these uncontroversial principles, courts disagree about the effect of an award rendered pursuant to such an arbitration agreement. Two related questions arise here: (1) Does federal law or state law govern the preclusive effect of an arbitration award in subsequent litigation? and (2) What collateral estoppel effect does such an award have?

1. *Federal or State Law*. Doubt exists whether it is federal or state law which governs the preclusive effect of a labor arbitration award in subsequent judicial proceedings. *See, e.g., Ivery v. United States*, 686 F.2d 410, 413 (6th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3684 (1983). Indeed, it is not always apparent what law governs the preclusive effect of federal judgments. *See generally* Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976).

This Court has suggested that an arbitration award is potentially preclusive without identifying the source of law that would make it so. *E.g., United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 & n.18 (1966). In recent decisions, however, the Court seems to assume that federal law controls. In *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974), and *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981), the Court evaluated the extent to which arbitration decisions would preclude relitigation of federal statutory issues in federal court by reconciling competing "aspects of national labor policy". *Barrentine, supra*, at 734; *see Gardner-Denver, supra*, at 45-47. Thus, this Court's approach in *Gardner-Denver* and *Barrentine* strongly suggests that it is the important federal policies that have shaped labor arbitration in this country — arbitral finality and industrial peace — which should determine the preclusive effect of a labor arbitration award in subsequent litigation.

Had the Court made this point explicit, this appeal might well have been unnecessary. From all appearances, the tribunals below did not believe that federal law governed the collateral estoppel issue. Certainly they did not apply federal law: federal law does not, for example, allow rejection of the collateral estoppel defense merely because the grievant was not formally a party to the arbitration, yet that is precisely the position taken by the Appeals Board below. *Compare* Appendix DD at 399-400 *with, e.g., Vaca v. Sipes*, 386 U.S. 171 (1967); *see Montana v. United States, supra*.

2. *Collateral Estoppel.* This Court has repeatedly extolled the policies underlying collateral estoppel and res judicata. *E.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401-402 (1981); *Montana v. United States, supra*, 440 U.S. at 153-55; *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 326-33 (1979). The Court has championed these policies against limitations on the preclusion doctrines which were justifiable historically but not

functionally. *E.g., Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313 (1971).[18]

Fair application of collateral estoppel and res judicata promotes not only the efficient allocation of the resources of courts and litigants, but procedural due process as well. Due process obligations in connection with these preclusion doctrines are, of course, imposed on the States by the Fourteenth Amendment to the United States Constitution. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940).

Do these policies, coupled with the federal policies favoring arbitral finality and the peaceful resolution of labor disputes, *see, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Republic Steel v. Maddox*, 379 U.S. 650 (1965), require that issues resolved in a labor arbitration not be relitigated in a state court? Possibly precedent does not demand this, but reason and fairness do.

It is instructive that, even without considering the strong federal policy favoring the finality of labor arbitration awards, some authorities have recognized that collateral estoppel normally should apply to factual issues determined in procedurally fair arbitrations. *E.g.*, Restatement (Second) of Judgments § 84(3).[19] As the Restatement's Commentators observe, "[w]hen arbitration affords opportunity for presentation of evidence and argument substantially similar in

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[18]*Blonder-Tongue* freed collateral estoppel from the traditional mutuality principle. The Court observed that, "[i]n any lawsuit where a defendant . . . is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources." *Id.* at 329.

[19]That subsection of the Restatement (Second) of Judgments provides:

> A determination of an issue in arbitration does not preclude relitigation of that issue if:
>
> (a) According preclusive effect to determination of the issue would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious; or
>
> (b) The procedure leading to the award lacked the elements of adjudicatory procedure prescribed in § 83(2).

form and scope to judicial proceedings, the award should have the same effect on issues necessarily determined as a judgment has." *Id.* at Comment c. When federal labor policy is factored in, therefore, it seems inevitable that labor arbitration awards would have collateral estoppel effect.

But although some federal courts have recognized the force of this position, *e.g., Becton v. Detroit Terminal of Consolidated Freightways,* 490 F.Supp. 464 (E.D. Mich. 1980), *modified,* 687 F.2d 140 (6th Cir. 1982), others have avoided ruling on the issue, *e.g., American Postal Workers v. United States Postal Service,* 682 F.2d 1280, 1283 (9th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3611 (1983), and still others, like the California tribunals below, have denied collateral estoppel effect, *e.g., Peabody Galion v. Dollar,* 666 F.2d 1309, 1320-21 (10th Cir. 1981).

Appellant submits that this lack of unanimity arises from lower courts' uncertainties about the thrust of this Court's decisions in *Gardner-Denver, supra,* and *Barrentine, supra.* In *Gardner-Denver,* the Court held that an arbitration decision sustaining a discharge against an employee's claim of racial discrimination did not preclude an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). Based on the legislative history of that statute, this Court concluded that Congress intended employees to have a right to a trial de novo in federal court notwithstanding the federal policy favoring arbitration. *See* 415 U.S. at 46 n.6. The Court rejected the defense of collateral estoppel, *see id.* at 49 n.10, and indicated that an arbitration award could, at best, constitute weighty evidence in a Title VII action, *id.* at 60 n.21. Similarly, this Court held in *Barrentine* that an arbitration decision on a wage claim did not bar a lawsuit on that claim under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. Looking again to congressional intent, the Court resolved the "tension" between the "[t]wo aspects of national labor policy" against the finality of the arbitration award. *See* 450 U.S. at 734,

745.

Thus, in both *Gardner-Denver* and *Barrentine*, the Court chose between conflicting federal labor policies. Appellant believes those cases should not, therefore, be taken to undermine the finality of arbitration decisions with respect to claims and issues later raised under *state* law. But some courts, such as the Tenth Circuit Court of Appeals in *Peabody Galion v. Dollar, supra*, disagree.

The *Peabody Galion* court, reaching the same result as the California tribunals below, ruled that federal law now condones relitigation in state court of issues determined in an arbitration under a collective bargaining agreement. The Tenth Circuit specifically held that, under *Gardner-Denver* and *Barrentine*, a state statute could overthrow an arbitration award as completely as a federal statute. 666 F.2d at 1321.[20]

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[20]In the words of the Tenth Circuit Court of Appeals:

> In the instant case it is true that the independent remedy arises under state law rather than federal. We hold, however, that that does not constitute a distinguishing factor.

Id.

Appellant admits that some of this Court's remarks in *Gardner-Denver* and *Barrentine* arguably do support a general retreat from arbitral finality. In *Gardner-Denver*, for example, the Court said:

> The distinctly separate nature of . . . contractual and statutory rights is not violated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

415 U.S. at 50. And:

> [T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.

Id. at 57-58. In *Barrentine*, similarly:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different con-

(footnote continued on following page)

Appellant respectfully submits that the case at bar presents a welcome opportunity for this Court to explain that the *Gardner-Denver* and *Barrentine* exceptions to arbitral finality are based on — and limited to — competition between *federal* labor policies. The States, California included, should defer to the federal policies favoring the peaceful resolution of industrial disputes through collectively bargained arbitration procedures. Because this Court has not yet explicitly held that factual issues determined in procedurally fair arbitrations are collateral estoppel in subsequent state litigation, Appellant believes plenary consideration of this case is appropriate.

B. Preemption to Prevent State-Law Nullification of the Results of Collective Bargaining.

Federal law precludes the application of state law to give to one party that which was bid for, but lost, in the collective bargaining process. *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 296 (1959); *see Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260 (1964). This rule should invalidate California Labor Code Section 132a as it was applied below.

Appellee challenged her discharge under the collectively bargained arbitration procedure. The arbitrator rejected her grievance on the ground that her continued employment would present an undue safety risk. Under federal law, the effect of that arbitration decision is exactly the same as if

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siderations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

450 U.S. at 737. In a similar vein, perhaps this Court spoke in unnecessarily broad terms when, in *Kremer v. Chemical Construction Corp.*, 72 L.Ed.2d 262 (1982), it stated that "[a]rbitration decisions, of course, are not subject to the mandate of [28 U.S.C.] § 1738." *Id.* at 278. In light of the doubt cast on arbitral finality by *Gardner-Denver* and *Barrentine*, the *Kremer* dicta that an arbitration award is not entitled to statutory full faith and credit is disturbing.

Appellant and the Union had bargained over, and ultimately agreed on, a contractual clause permitting Appellant to discharge any employee whose continued employment appeared to present an undue safety risk. *E.g.*, *United Steelworkers v. Warrior & Gulf Navigation Co.*, *supra*, 363 U.S. at 581.[21]

California Labor Code Section 132a should not be permitted to frustrate that collectively bargained solution to an industrial dispute. *Teamsters Local 24 v. Oliver*, *supra*; *cf. Local 926, International Union of Operating Engineers v. Jones*, 51 U.S.L.W. 4343, 4347 (1983) (National Labor Relations Act preempts state law where the factual issues underlying federal and state proceedings are substantially the same). But the decision of the Appeals Board below did exactly that, *see* Appendix DD, and the California Court of Appeal and Supreme Court concurred in silence.

California thereby ruled on this federal issue in a way which directly conflicts with the decisions of the Hawaii court in *Gouveia v. Napili-Kai Ltd.*, 97 Lab. Cases (CCH) ¶ 10,005 (Hawaii 1982),[22] and the Texas court in *Thompson*

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[21] [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Id. Cf. General Drivers Local 89 v. Riss & Co., 372 U.S. 517, 519 (1963) ("the policy of the Labor Act can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play").

[22] In *Gouveia*, the Hawaii Supreme Court dismissed a state-law emotional distress claim based on a discharge that had been upheld in arbitration. The state claim was not based on a workers' compensation statute, however, so *Gouveia* is in somewhat less direct conflict with California than the Texas case. Oklahoma, *see Peabody Galion v. Dollar*, *supra*, 666 F.2d at 1313-19, and Oregon, *see Vaughn v. Pacific Northwest Bell Telephone Co.*, 611 P.2d 281, 286-87 (Oregon 1980), may agree with California and disagree with Hawaii and Texas.

v. Monsanto Company, 559 S.W.2d 873 (Tex. Civ. App. 1977).

The facts in *Thompson* closely parallel those of this case. An employer discharged an employee who had recovered workers' compensation benefits. The employee grieved the discharge, claiming he had been terminated for reasons connected with the workers' compensation claim. The arbitrator ruled for the employer because the employee's physical disabilities indicated that he could not perform his job safely. The employee then sued under a Texas antidiscrimination statute, alleging that he was fired because he had pursued a workers' compensation claim.[23] The *Thompson* court held that, because of the arbitration award, federal law preempted the state statute. 559 S.W.2d at 876-77. The Texas Supreme Court subsequently approved the *Thompson* rule.[24]

Appellant submits that this split of authority on an important federal issue justifies this Court's plenary consideration. *Cf.* Supreme Court Rule 17.1(b) (certiorari may be appropriate "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeal").

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[23]Section 1 of the Texas statute, substantially the same as subsection 1 of California Labor Code Section 132a, read:

> No person may discharge or in any other manner discriminate against an employee beause the employee has in good faith filed a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Texas Revised Civil Statutes, Article 8307c, Section 1 (quoted in *Thompson, supra*, 559 S.W.2d at 874).

[24]In *Spainhouer v. Western Electric Company, Inc.*, 615 S.W.2d 190 (Texas 1981), the Supreme Court of Texas explained that the *Thompson* rule applied wherever "the employee had pursued his rights under the collective bargaining agreement to final arbitration". *Id.* at 191. The Texas Court also cautioned that, where "the grievance procedure under the collective bargaining agreement had broken off at an early stage and there was no arbitration", the state action would not be preempted. *Id.* Because Appellee in the case at bar did pursue her grievance to arbitration, of course, this clarification does not ameliorate the conflict between California and Texas.

C. Preemption by the National Labor Relations Act.

Conduct that the National Labor Relations Act arguably prohibits or protects generally is not subject to regulation by state laws, and a state statute that attempts to regulate such conduct is preempted by federal law. *Local 926, International Union of Operating Engineers v. Jones, supra*; *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 245-46 (1959). This preemption rule invalidates California Labor Code Section 132a as applied below because, in a spate of recent decisions, the National Labor Relations Board has suggested that conduct such as Appellant's discharge of Appellee is encompassed by the National Labor Relations Act. *See Farrens Tree Surgeons, Inc.*, 264 N.L.R.B. No. 90 (1982); *Grumman Flexible Corporation*, 264 N.L.R.B. No. 34 (1982); *Ohio Brass Company*, 261 N.L.R.B. No. 18 (1982).

The NLRB in *Ohio Brass* indicated that employment decisions adverse to employees which are made by employers on the basis of events related to workers' compensation claims could, depending on the facts, be either protected or prohibited by the Act. On the facts before it in *Ohio Brass*, the NLRB ruled it lawful for an employer to ask a job applicant about past industrial injuries he or she had suffered. But, reviving *Krispy Kreme Doughnut Corp.*, 245 N.L.R.B. 1053 (1979), *enforcement denied*, 635 F.2d 304 (4th Cir. 1980), the NLRB also reaffirmed that Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), would be violated if an employer discharged an employee because of an expressed intention to file a workers' compensation claim. *Ohio Brass, supra*, slip op. at 7 & 8 n.8.

Appellant's discharge of Appellee surely falls within either the protections or the prohibitions of the Act as recently interpreted by the NLRB in *Ohio Brass*. The Board suggested that the Act affirmatively protects personnel actions designed to keep the workplace safe:

> Respondent is entitled to be aware of any possible physical limitations of prospective employees to determine whether it is advisable to hire them, and, if they are hired, to avoid placing them in situations potentially dangerous to themselves and their fellow workers.

Id., slip op. at 6. The arbitrator, the Workers' Compensation Judge, the Appeals Board, and the courts below all agreed that Appellee was discharged for exactly this kind of reason; Appellant's conduct must, therefore, be at least *arguably* protected by the Act.

Moreover, on a slightly different view of the facts, the National Labor Relations Act arguably prohibits Appellant's conduct. The NLRB in *Ohio Brass* disinterred the rule of *Krispy Kreme, supra,* even though that decision had been denied enforcement by the United States Court of Appeals for the Fourth Circuit.[25] If California is right to characterize Appellant's discharge of Appellee as retaliatory despite the absence of discriminatory motive, then the discharge may violate the National Labor Relations Act as well.

Appellant stresses that, for the preemption doctrine to apply, conduct need only be *arguably* protected or prohibited. Appellant's conduct is both. Accordingly, the California courts had no jurisdiction of the case.

Appellant submits that this Court should give plenary consideration to the contention that the National Labor Relations Act preempts Section 132a as applied below because a conflict exists among the federal courts of appeals, the National Labor Relations Board, and the California tribunals below as to whether conduct such as Appellant's is covered by the Act.

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[25]Thus, the NLRB and at least one court of appeals disagree about whether a retaliatory discharge in connection with workers' compensation claims violates the National Labor Relations Act. The Tenth Circuit appears to agree with the Fourth Circuit and disagree with the NLRB, but has not fully explored the issue. *See Peabody Galion v. Dollar, supra,* 666 F.2d at 1319.

D. The California Supreme Court Violated Appellant's Right to Due Process.

Essential to the fair administration of the judicial system is that every litigant have reasonable notice and an opportunity to be heard. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Twining v. New Jersey*, 211 U.S. 78 (1908). Although the States are not "required to establish avenues of appellate review, . . . it is now fundamental that, once established, these avenues must . . . be applied with an even hand." *Rinaldi v. Yeager*, 384 U.S. 305, 310-311 (1966).

The California Supreme Court violated these principles of fundamental fairness when, in December 1981, it reversed the decision of the Court of Appeal without permitting Appellant to oppose the appeal. *See* note 12, *supra*. The California Supreme Court's decision was the turning point of the case: the Court of Appeal obeyed the Supreme Court's explicit mandate to review the Appeals Board's decision favoring Appellant, and then complied with the directive implicit in the Supreme Court's citation to *Western Electric Company v. Workers' Compensation Appeals Board, supra*, by reversing the Appeals Board.[26]

Since then, the California courts have simply refused to exercise their discretionary jurisdiction to consider any of Appellant's contentions. Appellant believes this entire course of events is fundamentally unfair and merits this Court's attention.

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[26]Although the Supreme Court's order on its face simply ordered review of the Appeals Board's decision, *see* Appendix OO, it operated as decision on the merits. The Appeals Board had ruled that, under *Western Electric*, Section 132a is not violated without a discriminatory motive. The Appeals Board thereby rejected Judge Butler's interpretation of *Western Electric*. *See* Appendix N. When the California Supreme Court ordered the Court of Appeal to review the Appeals Board's decision *in light of Western Electric*, therefore, it was plain what result the Supreme Court expected.

V.
CONCLUSION.

At the heart of this case lies California's refusal to defer to federal labor laws. Appellant humbly asks this Court to resolve the conflicts — among courts, among principles, among jurisdictions — on the substantial federal questions at issue in this appeal.

Dated: June 23, 1983.

Respectfully submitted,

GEORGE J. TICHY, II, ESQ.
MICHAEL B. MARGOLIS, ESQ.
LITTLER, MENDELSON, FASTIFF
& TICHY
A Professional Corporation
Attorneys for Appellant

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1983

Office-Supreme Court, U.S.
FILED
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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

DALGETY FOODS, INC.,

Appellant,

vs.

ANGELINA AVINA,

Appellee.

On Appeal from a Judgment of the Court of Appeal of the State of California in Case No. A020025 (California Workers' Compensation Appeals Board Case Nos. 76 SAL 8071 and 77 SAL 9360)

APPENDICES TO APPELLANT'S JURISDICTIONAL STATEMENT

GEORGE J. TICHY, II, ESQ.
MICHAEL B. MARGOLIS, ESQ.
Counsel of Record
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
1925 Century Park East
Suite 850
Los Angeles, Calif. 90067
(213) 553-0308
Attorneys for Appellant

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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APPENDIX A.

Collective Bargaining Agreement Between Dalgety Foods Inc. and Teamsters Local 890 (July 1, 1979 through June 30, 1982).

FROZEN FOOD AGREEMENT

1979-1982

AGREEMENT by and between DALGETY FOODS, INC., hereinafter called the "Employer" or the "Company" and GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 890, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the "Union".

Section 1

PURPOSE OF AGREEMENT

(a) The Company recognizes the Union as the sole collective bargaining agency for all employees in the Company's processing plants, cold storage plants, quick freezing plants, warehouses, receiving stations and sheds or lots adjacent thereto, where commodities and/or materials are processed, frozen or stored or new facilities which may be located within the geographical jurisdiction of the union party hereto where commodities or materials are to be processed; except office employees, superintendents, supervisory employees with authority to employ and discharge other employees, and plant security officers. Employees covered under this Agreement who are assigned to work outside the jurisdiction of this Agreement shall receive all the terms and conditions of this Agreement.

It is agreed by the parties that supervisory employees shall not replace employees in the collective bargaining unit in any work performed under the terms of this Agreement.

However, such supervisory employees may perform incidental work in connection with their functions as supervisors. For example work may be performed for purposes of instructing employees and in case of emergencies.

(b) This Agreement shall apply to any work done in the Company's plant, or in warehouses, sheds or lots connected therewith, customarily done by the Company.

(c) There shall be no discrimination against any employee on account or affiliation with, or bona fide activity on behalf of the Union, a party to this Agreement.

(d) It is understood and agreed that anyone now, or during the term of this Agreement, employed by the Company, who comes under the provisions of this Agreement, shall become a member of the Union upon the execution of this Agreement or thirty-one (31) days after the date of his employment, whichever is the later. Further, the Company agrees to notify the Union of job opportunities and shall give preferences of employment to persons who are experienced in the work of the Employer.

For the duration of this Agreement, as a term and condition of continued employment, all employees of the company who come under the provisions of the Agreement shall be required to be and remain members of the Union in good standing. Final decision as to whether an employee is a member in good standing in the Union shall be determined exclusively and solely by the Union.

(e) If the Union notifies the Company, in writing, that any employee is not in good standing in the Union, the Company will discharge said employee within five (5) days thereafter, unless before said five (5) days have elapsed the Union notifies the Company that said employee is in good standing.

(f) The Company agrees to require each person hired to execute a form provided by the Union setting forth the following: (a) Name of employee, (b) Company at which hired, (c) Date of employment, and (d) Social Security Number.

The Company further agrees to make the completed form described above available to the Union's Business Representative upon request, and the Company shall notify the Union no later than seven (7) days after any employee is hired.

(g) Those employees of the Company who authorize in writing to the Company, initiation fee and monthly dues deductions, shall have said fees so deducted from their pay.

The deduction shall be accomplished from the first pay period of each month for all employees working during that period, and for those employees who are not employed during that period but who, later in that month, work, and/or for new persons coming into the employ of the Company, for which authorizations are provided by the Union, other deductions shall be made.

The amounts so deducted shall be remitted promptly to the duly designated officer of the union.

Section 2
NONDISCRIMINATION

(a) The Company and the Union agree that the provisions of this Agreement shall be applied to all employees without regard to race, color, sex, religious creed, age, national origin, or handicap, as provided in the appropriate State and Federal laws.

(b) There shall be no discrimination against any employee on account of affiliation with, or bona fide activity on behalf of the Union, a party to this Agreement.

Section 3
PICKET LINES

The Union does not believe in sympathetic strikes and will do everything in its power to avoid one. It will not be a violation of this Agreement for any employee to refuse to go through a picket line sanctioned by the Joint Council of Teamsters in the area.

Section 4
WAGES

(a) The Employer agrees to pay the hourly base rate for the various classifications set forth and contained in Exhibit "A" attached hereto.

(b) Employees shall be paid for all time worked (except check-in and check-out time.) Employees compensated on an hourly basis shall be paid weekly.

(c) *Daily Assignment.* The rate of pay per hour for each hour worked by an employee shall be in accordance with the rate established for the job classification to which he is assigned, provided however, the rate of pay of an employee shall not be reduced during any day or shift by reasons of his assignment to a lower classification during such day or shift. Any complaint arising from the application of this section, in order to be valid, must be reported to the Company not later than five (5) days, excluding Saturday and Sunday, after receipt by the employee of his pay check covering the period of work during which the complaint arises.

(d) If the Employer elects to pay any employee or group of employees on an incentive (as distinguished from hour work) basis, such employees shall be guaranteed a minimum of the base hourly straight-time rate.

(e) Nothing in this Section shall prohibit the Employer from using, at his option, the "incentive" basis of pay,

"Straight hour work" basis of pay, or any combination thereof.

(f) Incentive rates applicable to the employees in any department for each product and for each classification of work shall be posted in advance upon a bulletin board in plain sight of the employees. Posted incentive rates shall state a definite unit price to be paid, and the unit work to which the unit price is applicable. Incentive rates may be changed thereafter to compensate for variations in products or processes, to correct errors, or for other reasonable causes. The Union shall be notified in writing in advance of any changes in incentive rates.

(g) Any protests involving changes in incentive rates must be filed as a grievance within five (5) days after such notice of change, otherwise the change shall be deemed approved. Changes in incentive rates in effect at the end of the preceding season are included within the meaning of this paragraph.

(h) By mutual agreement between the Union, the Employer and the employee, the Employer may adjust, below contractual standards, the wages of any employee who, because of physical disability, is unable to perform a satisfactory day's work.

(i) The Company will not discharge or fail or refuse to hire or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment on account of that individual's age, sex, race, religion, color, national origin, or handicap.

Any complaint arising out of the application of this section shall be subject to the grievance procedure of this Agreement.

(j) *Annual Assignment.* Employees with at least 1400 hours in the previous calendar year shall not be reduced from their principal bracket rate regardless of work assign-

ment. A list of such employees and their principal bracket rates shall be prepared by the Company and sent to the Local at the same time as the seniority lists are sent, as provided in Section 13.

In the first year that an employee gains a guaranteed bracket rate he shall be paid the guaranteed rate which the employee received for 700 hours or more of his working hours in the previous year.

The "highest hourly rate" shall be determined as follows: A statement shall be prepared showing the rates of pay and the number of hours worked at each rate of pay during the previous calendar year. Starting with the highest hourly rate on such statement, the corresponding hours shall be added until 700 hours or more of the total hours are reached. The rate last used to arrive at the 700 hours proportion then becomes the "highest hourly rate". In the event that an employee's seniority and ability would entitle him to credit for a higher rate of pay than used in the aforementioned statement, the employee shall receive credit in the computation for the rate to which his seniority and ability would entitle him.

After an employee gains a guaranteed rate, it shall be maintained from year-to-year thereafter unless the job or jobs on which he earned the guarantee are abolished, or unless the employee becomes unable to perform such job or jobs, unless the employee's inability to perform the job is due to an industrial injury. It is understood that year-to-year listings of principal bracket rates are not permanent but may be changed annually to reflect new or different work performed in the previous year.

(k) *Compensation of Salaried Employees.* The overtime and penalty time provisions of this Agreement shall not apply on a day-to-day basis to any employee covered

and paid a weekly or monthly salary, but the total compensation of any such employee shall not be less at the end of the calendar year than would his total straight and overtime compensation be if he were paid on an hourly basis at the contractual rate for the classification of work performed by him. For the purpose of this formula, the Company will keep an accurate record of all time worked by salaried employees covered by this Agreement. Within the period July 1 to July 30 each year, effective July 1, 1977, employees being compensated on a salary basis shall have the option of reverting for the coming year to the appropriate bracket rate for the work performed by them or of remaining on a salary basis of compensation. If the option to revert to the appropriate bracket rate is not exercised within the 30-day period, then the employee shall have no further option to change from the salary method of compensation as provided in this paragraph until the following July 1.

The Company shall give thirty (30) days notice to the Union of any employee covered by the bargaining unit who will leave the bargaining unit and become a non-union employee.

Section 5

HOURS OF EMPLOYMENT — OVERTIME

(a) *Workweek.* Eight (8) consecutive hours worked, excluding therefrom not less than one-half (½) hour nor more than one (1) hour for meals, shall constitute a workday. Five (5) workdays shall constitute a workweek, Monday through Friday inclusive.

All work performed over eight (8) hours in the workday shall be paid for at one and one-half (1½) times the straight time rate. All work performed over twelve (12) hours in the workday shall be paid for at double the straight-time rate. For each Saturday or Sunday worked, payment shall be

made as follows:

First eight (8) hours — One and one-half (1½) times the straight-time rate.

Over eight (8) hours — Two (2) times the straight-time rate.

(b) Whenever strawberries are being processed, the Employer may elect to use Saturday or Sunday as a straight-time day. For this provision to be applicable, the work schedule shall be posted weekly showing the scheduled day off. The above scheduled day off, if worked, shall be paid for at Sunday rates.

(c) *Workday*. A workday shall be a day from 6:00 a.m. to 6:00 a.m. of the following day.

(d) *Posting of Work Schedule*. Any notice concerning work schedules shall be posted not later than 12:00 noon on Thursday.

(e) Overtime assignments will be made on the basis of seniority. The most senior qualified employee shall have first choice to work such overtime assignment. If the most senior qualified employee refuses the assignment the next most senior qualified employee will be asked, and the process shall be continued until the last qualified person on the seniority list has been given the opportunity to work. The last qualified seniority employee must accept the overtime assignment or be subject to appropriate disciplinary action and in such event the next seniority employee must perform such overtime work.

If all operations are required to work the above provisions do not apply.

The above is subject to all the provisions under section 7.

Section 6
NIGHT WORK PREMIUM

A night work premium of ten (10) cents per hour for all hours worked between 6:00 p.m. and midnight and fifteen (15) cents per hour for all hours worked between midnight and 6:00 a.m. shall be paid to all employees in accordance with the following rules:

(a) When his daily overtime starts at or before 6:00 p.m., the employee shall not be entitled to the night work premium for any overtime hours worked after 6:00 p.m.

(b) Any employee who works between the hours of 6:00 p.m. and 12 o'clock midnight shall receive night work premium of ten (10) cents per hour for such hours.

(c) Any employee who works between the hours of 12 o'clock midnight and 6:00 a.m. shall receive night premium of fifteen (15) cents per hour for such hours.

(d) Any employee who works beyond 6:00 a.m. and is still on straight-time hours shall receive the night work premium of fifteen (15) cents per hour.

(e) The night work premium shall be added to the base rate for purposes of computing overtime payments to all employees who are entitled to the night work premium.

(f) Any employee entitled to night work premium shall have it indicated in some manner on his time card.

Section 7
MINIMUM AND REPORTING PAY

The employer shall make every effort to notify employees of any change in the daily work schedule not later than four (4) hours from the scheduled start of the shift.

Any seasonal employee called to work shall, upon reporting, receive an appropriately punched time card, the employee thereafter to receive a minimum of two (2) hours

pay if he is not put to work. If the employee is put to work, the employee shall receive a minimum guarantee of four (4) hours pay.

Maintenance personnel shall work equal hours as the production crew without being relieved prior to the end of the shift.

A Shop Mechanic shall be entitled to work the same number of hours as any Line Maintenance Mechanic with lesser seniority under the following circumstances:

(a) The Shop Mechanic is qualified to perform Line Maintenance Work.

(b) The Shop Mechanic has sufficient seniority to perform Line Maintenance work, and

(c) The Shop Mechanic has requested available Line Maintenance work.

Any regular seniority employee called to work shall receive eight (8) hours work or eight (8) hours pay.

(1) Employees shall be paid the straight or overtime rate, as the case may be, for all time during which they are forced to stand by. This provision shall not apply if standby is caused by:

(a) Temporary weather changes preventing harvesting of the crop in process. The Employer in such event will make a diligent effort to notify the crew in advance.

(b) Failure of any public utility.

(c) Failure of the freezing or cold storage plant preventing further processing, providing the Employer does not have responsibility for such failure.

Section 8
WORK RECESSES

(a) A maximum of one (1) hour standby time during any one shift, free of payment, may be called by the Company, provided such standby is caused by:

(1) Temporary weather changes preventing harvesting of the crop in process. The employer in such event will make a diligent effort to notify the crew in advance.

(2) Failure of any public utility.

(3) Failure of the freezing or cold storage plant preventing further processing, providing the Employer does not have responsibility for such failure.

(4) Bomb threat.

(b) One hour standby time shall not be paid if a changeover of product necessitates a cleanup of processing lines.

(c) When employees are checked out to avoid standby time, such standby time without pay shall not be for less than one (1) hour (unless by mutual agreement between the Company and the Union said minimum may be reduced to thirty (30) minutes) nor shall such standby time exceed one (1) hour in any one (1) shift worked, and all such standby time shall be counted as time worked for the purpose of determining when overtime rates of pay become effective.

Section 9
RELIEF PERIODS AND MEALTIME

All employees shall be allowed a relief period of twelve (12) minutes at the point of rest, after a maximum of two (2) hours of work, excluding the meal period. Exception — on multiple line operations (more than one line of the same commodity) the relief period may be allowed between one and three quarters (1¾) hours minimum and two and one quarter (2¼) hours maximum. A penalty of one-half the straight-time hourly rate shall be paid for all time involved if an employee is not given his relief period after each two (2) hours worked, or two and one quarter (2¼) hours on multiple line operations.

When the workday extends to nine hours, there shall be a rest period given on the eighth hour and no meal period.

If the workday extends beyond ten hours, then a one-half (½) hour meal period will be given after the eighth hour of work. If there is a violation of this section, the Employer shall pay the penalty of time and one-half the stright time rate for all hours worked after the eighth hour while in non-compliance with the above section. Such penalty payment shall be in addition to any other overtime compensation that the employee may have earned.

Mealtime shall not be less than one-half hour or more than one (1) hour. Any change in the mealtime of one hour or one-half hour shall be mutually agreed to between the parties. No employee shall be required to work more or less than four (4) hours without a meal period unless the shift will be completed in six (6) hours (except as provided below under special provision). A penalty of one-half of the straight-time hourly rate shall be paid for all hours or parts thereof which are in violation of this provision.

Special Provision. When the first shift starts after 8:00 a.m., the lunch time shall be set by mutual agreement between the Company and the Local Union.

If any employee's meal period is interrupted and the employee is required to return to work, he shall be entitled to a paid lunch period.

Line mechanics assigned to the maintenance of an operational line will receive eight (8) hours of pay, including lunch.

Meal periods presently in effect in the individual plants shall not be changed unless mutually agreed to by the parties.

Section 10
INTERVAL BETWEEN SHIFTS

(a) There shall be a lapse of at least eight (8) hours between the time an employee finishes one (1) day or shift and starts another day or shift; provided, however, that when

a "change-over" occurs from one regular shift schedule to another regular shift schedule, this rule shall not apply. As usual in this paragraph, the term "regular shift" means at least five (5) working days.

(b) Except as provided for a "changeover" in paragraph (a) above, a penalty payment of one-half the straight-time hourly rate shall be paid for the encroaching hours worked by an employee after he is called back short of the required eight (8) hour interval. All such encroaching hours shall be considered part of the succeeding shift for purposes of computing daily overtime and required intervals for meal periods.

(c) The eight (8) hour provision may be waived by mutual agreement between employee and employer.

Section 11
HOLIDAYS

(a) The following holidays shall be recognized: New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, December 24 and Christmas Day, and one additional holiday during each calendar year to be selected by the Employee who shall give four weeks' advance notice before such holiday.

(b) Eligibility for benefits for all contractual holidays:

(1) Regular seniority employees whose names appear on the Company's current regular seniority list.

(2) Employees whose names appear on the current seasonal seniority lists, except new employees whose names are added during a calendar year and do not become eligible for holiday pay until the following calendar year, are entitled to receive as paid holidays: Fourth of July, Labor Day, Thanksgiving Day, December 24, and Christmas Day. Any seasonal seniority employee who works 9 days during a month shall receive holiday pay.

(c) All eligible employees must meet the following requirements:

(1) If called to work on the holdiay, the employee must work or forfeit holiday pay. The employee shall not forfeit the holiday if:

(a) Work is not available, or

(b) He has a valid excuse for his absence.

(2) For New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, December 24, Christmas Day and one additional holiday as set forth in (a) above, regular seniority employees, as provided for in Section 13 must be on the payroll during the month in which the holiday falls in order to qualify for the holiday pay.

(d) Calculation of holiday pay.

(1) The amount of pay for an unworked holiday shall be eight (8) hours pay at the employee's hourly rate in effect on the employee's previous working day, or if the employee is on an incentive basis of pay, the holiday pay will be eight (8) hours at the contractual straight-time hourly rate.

(2) Established personal premiums shall be included in the calculation of pay for holidays not worked, but night work premium shall not be included.

(3) An employee eligible for holiday pay who works on the holiday will receive the eight (8) hours of holiday pay, as provided above, plus time and one-half for the first eight (8) hours worked and two (2) times the straight-time rate for all hours worked over eight (8).

(4) An employee not eligible for holiday pay who works on the holiday shall receive Sunday rates.

(e) Other General Holiday Provisions:

(1) If a holiday falls on a Friday, Saturday or Sunday, it shall be observed on a day mutually agreed to by the

Union and the Company. No employee shall lose a holiday because it falls on a non-scheduled work day.

(2) If an eligible employee is on vacation, the pay for the contractual holiday which falls during the vacation will be added to the vacation pay or the employee will be entitled to an additional day off, if the employee so desires.

(3) Any employee desiring to attend church services on Good Friday shall be allowed time off, without pay, between the hours of 12:00 noon and 3:00 p.m.

(4) Holiday Pay will be considered time worked when computing fringe benefits.

Section 12
VACATIONS

(a) Qualifying Period for Vacation. The term "qualifying period", as used in this section, shall mean the twelve (12) months of the year or the twelve (12) months dating from the hiring date of the employee, or an anniversary thereof, during which the employee's name appears on the Company's regular seniority list. Either type of "qualifying period" may be used by the Company in keeping vacation records.

(b) Eligibility for Vacation Benefits. For the purposes of this Section a "year of service" for an employee is defined as each year the employee's name appears on the Company's current regular seniority list.

Effective January 1, 1969, eligible employees whose names appear on the Company's current regular seniority list will be granted vacations in accordance with the following schedule:

Years of Service	*Length of Vacation*
One (1) year but less than three (3) years	1 week
Three (3) years but less than ten (10) years	2 weeks
Ten (10) years but less than eighteen (18) years	3 weeks
Eighteen (18) years and over	4 weeks

(If the percentage vacation payment system is used, vacation earnings shall be included in the computation.)

(1) *Calculation of Vacation Pay* (*Regular Seniority Employees*):

(a) An employee entitled to one (1) week of vacation shall be paid for such vacation an amount equal to forty (40) hours, or two (2) percent of his total earnings, including vacation pay, earned during his qualifying period.

(b) An employee entitled to two (2) weeks of vacation shall be paid for such vacation an amount equal to eighty (80) hours or four (4) percent of his total earnings, including vacation pay, earned during his qualifying period.

(c) An employee entitled to three (3) weeks of vacation shall be paid for such vacation an amount equal to one-hundred twenty (120) hours or six (6) percent of his total earnings, including vacation pay, earned during his qualifying period.

(d) An employee entitled to four (4) weeks of vacation shall be paid for such vacation an amount equal to one hundred sixty (160) hours or eight (8) percent of his total earnings, including vacation pay, earned during his qualifying period.

(2) *Calculation of Vacation Pay* (*Seasonal Seniority Employees*)

(a) Seasonal employees who have worked 1400 hours or more in the preceding year shall be entitled to a maximum of one week's paid vacation.

(b) Seasonal seniority employees who have worked 1400 hours or more in the preceding year and whose names have appeared on the Seasonal Seniority list five or more consecutive years shall be entitled to a maximum of two weeks paid vacation.

(c) If an employee terminates or is discharged during his qualifying period, after completing 1400 hours he shall be entitled to earned vacation pay.

(d) In the event the calendar year is used, vacations will be paid on a pro-rata basis for any fraction of the year worked.

(e) Any employee who has qualified for a vacation as seasonal seniority employee shall have time credited for all years of service applicable to all vacations for regular seniority employees when this employee becomes a regular seniority employee.

(3) *General Provisions*

(a) Calculation of vacation pay as to weekly (40) hours or percentage basis, whichever is greater. (40 hours at current rate.)

(b) Consistent with operating requirements, vacations shall be scheduled in accordance with seniority and shall be mutually agreed to by the employer and employee. All eligible employees shall be required to take an annual vacation. No wage payment shall be made in lieu thereof. All employees shall receive their vacation pay on a separate check before commencing their vacation. The Employer shall make every reasonable effort to give two weeks notice of vacation schedule.

(c) Vacation pay will be considered time worked when computing fringe benefits and vacation hours.

(d) Any employee with more than one week vacation may split his vacation, the minimum vacation to be not less

than one week.

(e) Any employee on regular seniority with a year of seniority or more shall receive prorated vacation pay for any part of a year they might have worked upon termination.

Section 13
SENIORITY

(a) There shall be one posted seniority list in each plant. Seniority will be attained after an employee works 20 days in a given plant in any one year.

(b) A regular seniority employee is defined as an employee whose name appears on the Company's seniority list as indicated by the letter (R). Persons qualifying as a Regular seniority employee are entitled to benefits as set forth herein.

Protection of Eligibility. Retroactive to July 1, 1971, employees who become "Regular Seniority" employees under the existing collective bargaining agreement shall receive credit for prior years of service as "Seasonal Seniority" employees in determining "complete year of service" under the "Schedule of Benefits".

(1) "Processing work time" and "processing of perishable products" includes, but is not limited to:

(a) The labeling of transil products only during the period when fresh produce is being processed; and

(b) The packaging or labeling of individually quick frozen (IQF) products from bulk containers at any time.

(c) Notwithstanding any of the criteria indicated above, it is agreed that any employee working in Bracket I, Bracket II, or Bracket III shall qualify for regular seniority after completing a probationary period of ninety (90) days from date of employment in Bracket I, II, or III.

An employee qualifies for regular seniority in his ninety-first (91st) day if he has worked in Bracket I, II, or III the

major part (more than one-half) of the regularly scheduled work days in each of three (3) consecutive months.

The ninety (90) day period referred to above shall start on that day within his first qualifying month in which he worked in the Bracket.

EXAMPLES

Examples: Employee A

Month	Plant Scheduled Work Days	Days Worked By Employee	Qualifies
July	24 Days	13 Days	
August	22 Days	12 Days	
September	15 Days	8 Days	October 1
Employee B			
July	22 Days	8 Days*	
August	20 Days	11 Days	
September	24 Days	14 Days	
October	10 Days	8 Days	November 1
Employee C			
July	16 Days	9 Days	
August	18 Days	10 Days	
September	20 Days	8 Days	No.**

*In this example the employee commenced work in either Brackets I, II, or III on July 20th.

**This employee loses all accumulated credits and starts again.

(d) Any seasonal Seniority employee whose name appears twelve (12) consecutive times on the company's Seasonal Seniority List shall become Regular Seniority.

(e) A "seasonal seniority" employee is defined as any employee who works twelve (20) days in a given plant in any one year or any employee who works sixty (60) percent

of the total operating days in that plant for the work year.

(f) Upon qualifying as a seasonal employee, the employee's name shall be added to the current posted seasonal seniority list for the protection of seniority privileges only.

(g) The order of seniority shall be based on the hiring date, as accurately as can be determined.

(h) Not later than February 1st of each year during the life of this Agreement a seniority list which is effective as of January 1st each year shall be prepared by the Employer and supplied to the Union for inspection. On February 15th a copy of this list shall be posted in the plant for inspection by employees. All requests for correction in the listing of any employees shall be made in writing within thirty (30) days after the employee returns to work, and after said thirty (30) days, no changes will be made for any reason. The seniority lists for the previous year shall remain posted and in effect until replaced by new lists.

(i) The Employer shall add the employee's name to the seniority list on the date he qualifies. Until an employee's name appears upon a seniority list, he shall not be entitled to seniority privileges. Job assignment, layoff and rehiring may be made without regard to hiring dates until such time as an employee gains seniority listing. Employees who have not gained seniority and who the Company does not intend to recall shall be notified they are being terminated.

(j) In observing seniority principles for filling jobs, rehiring and layoffs of employees, it is recognized that the employer shall be the judge of the qualifications of the employee to perform the work available, but it is also recognized that seniority workers are entitled to primary consideration, and the Employer shall not arbitrarily exercise its right of selection. Any question will be subject to the grievance procedure as outlined in Section 16 of this

Agreement.

It is recognized that in making promotions from one job covered by this Agreement to another job covered by this Agreement, consideration shall be given by the Employer first, to ability and physical fitness, and second, in length of service. It is understood, however, that other things being equal, seniority shall prevail.

In the event of a layoff because of the curtailment of seasonal activities, seniority employees, if qualified, shall be entitled to claim available jobs with equal or lesser rates of pay held by employees with less seniority, but are not entitled to claim any specific jobs, it being understood that the principle of seniority establishes the right of job security but not job selection.

All job opportunities shall be posted and an applicable bidding system shall be developed and observed in filling all jobs which become vacant. A recognized training program shall be decided upon between the Company and the Union for such classification in existence and this training period shall be so noted in the bargaining agreement or classification manual.

(k) Employees who have attained seniority shall be given an opportunity to choose a preference between shifts before or at the time any two or more shifts are started and shall be granted such choice within the limitations of operations scheduling and qualifications of such seniority employees.

(l) Seniority will be forfeited under the following conditions:

(1) If the employee is discharged for cause.

(2) If the employee voluntarily quits.

(3) If, upon resumption of operation or when rehiring after a temporary layoff, the employee is reasonably notified to report to work and fails to do so at the specified time,

unless such failure to report is excusable for reasons satisfactory to the Employer and to the Union. If such failure to report is excusable, the employee shall lose only the immediate employment offered, and shall be continued in his relative place on the seniority list.

(4) If the employee is absent without authorization of the Employer.

(5) If the employee fails to report to work at the termination of a leave of absence.

(m) *Demotion or Discharge.* In cases of demotion (permanent) or discharge of employees on the seniority list, the Company will notify the Local before action is taken, unless circumstances beyond the control of the Employer prevent such notification.

(n) Any person rehired, after losing his seniority, shall be rehired as a new employee, having forfeited all previously accrued privileges and benefits provided in this Agreement.

(o) Seniority will be retained under the following conditions:

(1) A seniority employee who does not work twenty (20) days or sixty (60) percent of the total operating days in a given plant in one (1) year because of lack of work.

(2) Leaves of absence shall be granted under the following circumstances:

(a) When employees leave their jobs to accept positions with the Union, provided that upon termination of such position they shall notify the Employer within thirty (30) days of such termination that they are available for reemployment.

(b) If the employee suffers an injury on the job or suffers an illness growing directly out of an injury on the job, such leave shall automatically terminate on the date the employee is released by the medical doctor to return to work. How-

ever, if the employee feels that he is improperly released by the compensation doctor, he shall have the right of an extension of not more than fifteen (15) days to secure medical evidence supporting his contention.

(c) A joint leave of absence review committee will be formed to review all leaves of absence extending beyond twelve (12) months.

(3) Leaves of absence may be granted when an employee requests a leave in writing and in the Employer's judgment such leave is consistent with operating requirements.

(4) A leave of absence shall not be valid unless granted by the Employer in writing and approved by the Union. The Employer will not arbitrarily withhold the leave, and the Union will not arbitrarily withhold approval.

(p) A leave of absence shall protect an employee's seniority, but leave of absence time shall not count as time worked in computing vacation or paid holiday eligibility.

(q) The Company shall designate and send to the Local a list of persons authorized to grant Leaves of Absences for sickness or other emergencies. Such leaves need not be in writing but a record shall be made of the permission granted. Such leaves will not be official unless granted by the authorized person or persons, and the Locals shall be notified in writing of all such leaves of more than three (3) days.

(r) Protection of Seniority. Any employee on the regular seniority list as of July 1, 1968, or thereafter, shall remain on the regular seniority list during the life of this contract. This protection shall not apply if the employee was off work of his own volition or was terminated.

(s) Plants will observe seniority principles in making work assignments where more hours of work are involved. Utmost cooperation between plant supervisory personnel

and the Union is urged in this area of the contract application.

(t) *Job Posting*

(1) All jobs outlined in the Joint Frozen Food Classification Committee Manual being permanently vacated, or which will be created by a predictable need, will be posted on the job posting board for a period of five (5) calendar days from the date of posting. During the posting period, only interim appointments may be made.

(2) Only applications made within the specified posting period by employees will be considered.

(3) Application may be made for a higher paying job, or a lateral job, if the job held by the employee offers no increase in pay opportunities or promotional opportunities.

(4) The Employer will consider all employees who apply, although consideration need not be limited to this group if there are no qualified applicants.

(5) A copy of all posted vacancies shall be sent to the Local Union prior to being posted.

(6) Any employee, prior to commencing his leave, vacation or approved leave of absence shall receive a form from the employer on which he shall be given the opportunity to bid on a job which will become available during his absence. The employee shall complete the form and return it to the Employer within the posting period.

(7) The Employer shall send a notice for any job posted to all employees who have not, or may not have been afforded the opportunity to become aware of such posting, for reasons such as, but not limited to, sickness, leave of absence, vacation or injury. The employee, within the posting period, shall apply in writing for the opening, unless he can demonstrate that it was not possible for him to do so. In which event, he shall be given the opportunity to bid on the job within three (3) days after his return to work.

(8) The Local Union shall be notified in writing when the job is filled.

Any complaint arising out of the application of this section shall be subject to the grievance procedure of this Agreement.

(u) *Job Training*. The Employer and the Union shall adopt a training program as submitted by the Job Training Committee.

Section 14
BULLETIN BOARDS AND WORKING RULES

(a) The Union shall have the privilege of installing bulletin boards within the plant at suitable locations agreeable to the Employer, and may post notices of bona fide union activities.

No other matter shall be placed on bulletin boards unless it is first submitted to and approved by the Employer.

(b) Any house rules or working rules or regulations of the Company affecting general conduct of the employees in or about the premises of the plant shall be reduced to writing in a form easily read and understood and shall be permanently posted in conspicuous places throughout each plant. A copy of the Company's house rules shall be sent to the Local. The Company shall not establish any house rule or working rule in conflict with this Agreement.

(c) The Company shall have consistent rules for wearing hairnets.

(d) Employees shall not be required to wear head bands advertising the name of the Company.

(e) The Employer shall pass on to the employee emergency phone calls received for the employee at the plant.

Section 15
UNION RIGHT TO VISIT

The Employer agrees to admit to its plant at all reasonable times the authorized representative of the Union for the purpose of observing the application of this Agreement and

adjusting grievances. These activities are to be discharged in a manner that will avoid unnecessary loss of time or disruption of working schedules. The Union representative shall advise the Employer of such visits by notifying the plant office before or at the time of entering the plant.

Section 16
GRIEVANCE ADJUSTMENT

A grievance is defined as any difference or issue between an employee or the Union and the Employer arising out of the application or interpretation of any provision of this Agreement.

Any grievance or controversy between the parties shall be settled in the following manner.

The Company and the Local Union shall first attempt to resolve the issue. If it is not settled within five (5) working days after written submission, it shall automatically be referred to the Arbitration Board, unless the time is mutually extended by the Company and the Local Union.

An Arbitration Board shall be established to process cases which cannot be resolved by the parties. The Arbitration Board shall consist of two members representing the Employer and two members representing the Union. No Board Member or alternate who is an official or an employee of the Employer party to the case or Union representative of the Local Union party to the case shall serve on the Board for that particular case.

A principal Arbitrator shall be selected by mutual agreement who shall be the fifth member of the Board. In the event of the unavailability of the principal Arbitrator during the period requested by the parties, alternate arbitrators shall be asked to serve in order agreed upon by the parties. In the event of a vacancy among the list of arbitrators, such vacancy shall be filled within fifteen (15) days by the four

(4) members of the Arbitration Board. If the Board cannot agree upon a successor within the time specified, he shall be selected by the Chief Judge of the Federal District Court in San Franciscto.

No more than six (6) cases shall be heard in a single day.

The maximum time for any grievance to be heard by the Arbitration Board shall be thirty (30) days from the date the grievance is filed in writing by the Union with the Employer or by the Employer with the Union unless an extension is mutually agreed upon by the parties. In the event of an urgent grievance filed by a local or a company, an Arbitration Board meeting will be held within ten (10) days from the date the grievance is filed in accordance with the above procedure.

Failure on the part of the complainant, whether company or local, to appear in any cases pending before the Arbitration board shall result in the forfeiture of its case by the complainant party.

No claim for back pay will be valid for a period prior to 15 days before the date the grievance was first reduced to writing unless neither the Union nor the employee could reasonably be expected to know the existence of the claim, in which event the claim will be valid back to the original date that the violation occurred.

Decisions of the Arbitration Board will be in writing and will be final and binding on both parties.

Expenses of the Arbitration Board will be shared equally by the parties to this Agreement.

The Arbitration Board is empowered to make its own rules of procedure but cannot change the present Agreement or make new Agreements.

In hearings before the Arbitration Board, the parties by mutual agreement may announce at the start of a hearing in

any case that the parties desire a subsequent written opinion or decision by the Arbitrator. Transcripts of the hearings shall be made by mutual agreement of the parties except that either party may at its own expense request a transcript providing it does not delay the arbitration decision or procedure. The written decision shall be rendered within fifteen (15) days after the hearing. If no request for a written decision is made, the case will be decided immediately by a majority vote upon the conclusion of oral presentation.

Section 17
WORK STOPPAGE

Pending the settlement of any issue or grievance between the parties, there shall be no lockouts, strikes or work stoppages by either party.

The provisions of this section shall not be effective if either party fails to abide by the Grievance Adjustment and Arbitration provision of this Agreement.

Section 18
WELFARE PLAN — DENTAL PLAN

Regular Seniority Employees

(1) It is agreed that a health and welfare plan for regular seniority employees shall be a part of this Collective Bargaining Agreement and jointly administered by a Board of Trustees of an equal number of representatives designated by the Employer and the Union. Regular seniority employees shall be covered by the Frozen Food Industry Welfare Plan 8090-A.

During the term of this agreement, the employer agrees to maintain the level of benefits provided for in the existing Frozen Food Health and Welfare Plan 8090-A.

(2) Increase Regular Seniority Benefits Plan 8090-A, effective August 1, 1979, to reflect the following:

(a) Increase Major Medical from $20,000 to $150,000.

(b) Major Medical — usual and customary 80%.

(c) Dental — 90% of Schedule M.

(3) If an employee qualifies for regular seniority between the 1st and 15th of the month, the employer shall contribute a premium payment for the current month, if the employee has worked the necessary number of hours for such payment.

If an employee qualifies for regular seniority between the 16th and 31st of the month, the employer shall contribute a premium payment by the 10th of the next month, if the employee has worked the necessary number of hours for such payment.

Seasonal Seniority Employees

(1) The Frozen Food Industry Welfare Plan 8090 Premiums are to be paid in full by the Employer.

During the term of this agreement, the Employer agrees to maintain the level of benefits presently provided for in the existing Frozen Food Industry Welfare Trust Fund.

Such employees shall have the right to maintain their own coverage when not otherwise eligible. Payment for coverage shall be made by the employee through the Union's office.

(2) Eligibility shall be based on the following:

(a) Employees with three (3) or more years of seasonal seniority status or who have worked 1400 hours or more in the previous calendar year shall be entitled to and eligible for Health and Welfare coverage.

(b) Eighty (80) or more paid hours in the previous calendar month shall qualify the employee for coverage in the current calendar month.

(3) The Employer agrees to provide health and welfare benefits for minor dependents, excluding the spouse.

(4) Health & Welfare Improvements (3 yrs. Seasonal Seniority).

Increase the Seasonal Seniority Benefits Plan 8090 effective August 1, 1979, to reflect the following:

(a) Change Basic Medical Room and Board from $30 to $100.

(b) Increase Major Medical from $10,000 to $150,000.

(c) Dental — 90% of Schedule M.

Section 19
PENSION PLAN

Contributions

(1) The Company will contribute to the Western Conference of Teamsters Pension Trust Fund, in accordance with the schedule herein to provide benefits for each employee's (Trades-Drivers-Lead Personnel) straight-time hours worked, including paid vacation and holiday hours, up to a maximum of 173⅓ hours worked per month.

(2) *TRADES — DRIVERS — LEAD PERSONNEL*

(a) 63 cents per hour contribution to the Western Conference of Teamsters Pension Fund, effective July 1, 1979, for lead personnel, trades, and drivers as described below.

(b) The company will contribute seven (7) cents effective 1-1-80, seven (7) cents effective 1-1-81 and seven (7) cents effective 1-1-82 for each covered employee (Trades, Drivers and Lead Personnel) as described in Section 19.

(3) *NON-TRADES*

(a) 21 cents for each compensable hour contribution to the Western Conference of Teamsters Pension Fund, effective July 1, 1979, for non-trades as described below.

(b) 14 cents per each compensable hour contribution to the California Frozen Food Pension Trust Fund, effective

July 1, 1979, for non-trades as described below.

(c) Effective January 1, 1982, an additional ten cents (10¢) per each compensable hour shall be paid into the appropriate Pension Trust as agreed to by mutual consent of both parties.

(4) *JOB CLASSIFICATIONS FOR PENSION*

(a) *LEAD PERSONNEL*

Assistant Hourly Foreperson
Hourly supervisor
Leadperson
Head Warehouse Supervisor
Full Time Crew Leader
Floor Leader
Head Grader — Finished and Raw
Production Hourly Foreperson

(b) *TRADES*

Head Refrigeration and Boiler Mechanic
Automotive Mechanic — Class I
Electrician — Class I
Maintenance Mechanic — Class I
Head Boiler Room Attendant — Class I
Refrigeration Mechanic — Class I
Wrapper Mechanic — Class I
Building Trades Maintenance Mechanic
Polybag Mechanic — Class I
Maintenance Mechanic — Class II
Refrigeration Attendant
Vacuum Tank Attendant
Wrapper Mechanic — Class II
Polybag Mechanic — Class II
Electrician Helper
Mechanic Helper
Centrifuge Operator

Lye Peeler Operator
Raw Product Receiving Clerk and Weighmaster
Wrapping Machine Operator
Fiberboard Printer — full time
Case Stitcher — full time
Sauce Maker — Cooker
Oiler and Greaser
Automatic Plate Freezer Operator

(c) *DRIVERS*

Truck Driver — Class I
Produce Truck Driver
Plant Truck Driver — Class II
Pickup Truck Driver
Forklift Operator
Power Transport Operator

(d) *NON-TRADES*

Manual Transport Operator
Carloader, truckloader and unloader
Lugbox, Pallet repair — full time
Sugar Dumper
Tunnel & Freezer Person
Automatic Casing Machine Operator
Pallet Checker
Machine Operator
Clean-up crew Person
Case Stacker
Line Checker
Laboratory Worker
Hand Caser
Raw Product Checker
Wrapper Feeder
Butter Sauce Dispenser
Flex-Vac Operator

Automatic Bagger Operator
Tray-off Attendant
Carton Machine Stuffer
General Labor

Section 20
JURY AND WITNESS DUTY

The Employer shall pay seniority employees called to jury duty, or subpoenaed to appear in Court as a witness, the difference between their regular straight time compensation and the payment received by them as jurors. Jury duty hours shall count toward fringe benefits eligibility. Employees will not be required to report to work on any day they have been subpoenaed to Court as a juror or witness.

Section 21
SICK LEAVE PLAN

Eligibility. Only employees whose names appear on the current regular seniority list are eligible. (Paid sick leave hours shall be credited toward eligibility hours.)

Protection of Eligibility. Retroactive to July 1, 1971, employees who become "Regular Seniority" employees under the existing collective bargaining agreement shall receive credit for prior years of service as "Seasonal Seniority" employees in determining "complete years of service" under the "Schedule of Benefits."

Any employee on the regular seniority list as of July 1, 1968, or thereafter, shall remain on the regular seniority list during the life of this contract. This protection shall not apply if the employee was off work of his own volition or was terminated.

Waiting Period. There shall be a waiting period of three (3) working days on each disability before the benefits are payable. If an employee is off work for a period of at least

three (3) days, due to illness, and provides the company with an authorized Doctor's Release to return to work, the sick leave payments will begin on the second (2nd) day of absence. In cases of a relapse caused by the same illness or injury within two (2) weeks after an employee returns to work, no waiting period is required.

Calculation of Benefits. Disability pay will be calculated on the basis of straight-time hours the employee would have worked (based on each employee's annual assignment hourly rate), for each of the employee's scheduled straight-time days of work lost due to the disability, less the waiting period. If the employee is on layoff and is called back to work but is unable to return because of a disability, sick leave will start for the time he would have been at work, less the waiting period. If the employee, based on his seniority and qualifications, would have been on layoff, no disability pay is due during such layoff periods. The intent of this section is to provide that an eligible employee will receive the designated sick pay for his straight-time scheduled days of work for which he is not paid wages on account of the disability.

In no event shall there be a layoff for the purpose of avoiding the payment of sick benefits.

Schedule of Benefits

Completed Years of Service	Weekly Benefits at Full Pay
1	1
2	2
3	3
4	4
5	5
6	6
7	7
8	8
9	9

Schedule of Benefits

Completed Years of Service	Weekly Benefits at Full Pay
10	10
11	11
12	12
13	13
14	14
15	15
16	16
17	17
18	18
19	19
20	20
21	21
22	22
23	23
24	24
25	25
26 or more	26

Application of Benefit Schedule. The Benefits under Worker's Compensation are separate from and in addition to the benefits provided for non-industrial cases. For examle, the employee may exhaust his benefit schedule while off work for a Worker's Compensation injury but after returning to work will still remain eligible to apply his schedule of benefits for non-industrial disability. This also applies in reverse in the event the non-industrial disability occurs first and an industrial injury occurs after he returns to work.

Integration with U.C.D. and Worker's Compensation. Employer-paid benefits will be fully integrated with U.C.D. and Worker's Compensation, and this will be accomplished in the following manner:

Full-Week Benefits. During full-week benefits, the company will supplement the weekly U.C.D. and Worker's

Compensation payment for which the employee is eligible up to a maximum of 100% of the employee's normal weekly straight-time earnings.

Renewal of Benefits. Whenever an employee has worked 130 working days or more during a 12 month period since his last paid disability, the full schedule of benefits is renewed automatically, twelve months after his last paid disability, in accordance with his service. He is always eligible for his scheduled amount of benefits, less accumulated periods of paid disability which has occurred since he has worked a period of 130 working days during a 12 month period.

If an employee is on sick leave at the time he becomes ineligible to be continued on the sick leave roster, he shall be eligible for the remaining part of his existing benefits schedule as long as he remains continuously disabled with the same disability.

Proof of Claim. If required by the Company, a claim for disability payments shall be supported by a certificate from a physician or surgeon who is licensed to practice medicine. When required, such certificate shall be supplied to the Company by the employee. The Company shall have the right at any time to make an investigation of each claim filed. Any dispute between the parties as to the validity of a claim shall be referred to the Joint Sick Pay Review Committee.

Notification Required. In case of illness or disability, notice shall be given to the person or persons designated by the Company, provided such person or persons are available to receive such notice during specified hours. The waiting period for benefits shall commence on the date such notice is received by the Company unless unusual circumstances beyond the control of the employee

Conditions Not Covered. Employees will not be entitled to disability pay under this plan:

(1) If the sickness or injury s due to willful self-injury, intoxication, the use of narcotics or habit forming drugs, or for illness or injury resulting from willful, illegal action.

(2) If he is injured while performing work for another employer, unless such work is performed with the knowledge and written consent of the primary employer.

(3) If his sickness or injury is the result of an act of war.

(4) If an employee is taken sick while on vacation the waiting period begins as of the day the employee was scheduled to return to work.

If the employee has a chronic illness causing recurrent absences, the benefit schedule will not be renewed with respect to said chronic illness. The determination as to whether an illness is chronic will be based on a combination of an employee's employment history and medical evidence.

If an employee receives a settlement or award covering lost wages, the Company shall have the right to recover disability payments made by the Company during such period or periods.

Joint Sick Pay Committee. A Joint Sick Pay Review Committee shall be established consisting of three representatives of the Employer and three representatives of the Union. This Committee shall have the responsibility of adjudicating any differences that may develop between an individual employer and an individual union with reference to eligibility for coverage, the operation of the plan, or the validity of any claim. In the event that such committee is unable to resolve any issue, the matter shall be submitted to an impartial arbitrator for final determination.

Section 22
MEDICAL EXAMINATION

Effective January 1, 1969, the Employer will contribute one (1) cent per hour for any employee who is a member of the bargaining unit covered by this collective bargaining agreement to a Medical Examination Plan. A trust is to be established comprised of an equal number of trustees to be designated by the Employer and the Union for the proper administration of the Medical Plan. Any employee who is not permitted to take the examination on work time shall be paid five dollars ($5.00) if required to take the examination on his own time.

Section 23
JOB INJURY

Employees injured on the job shall have all lost time counted for the purposes of computing fringe benefits, provided however, that time lost in excess of six (6) months shall not count for the purpose of this section.

If an employee is injured at work and the employee is unable to return to work, the Company will pay the employee's wages for the day of injury based on the number of straight-time hours he would have worked.

The Company is to maintain an adequate first aid station manned by a competent attendant during all working hours of the Company.

The Employer shall maintain an adequate worker's compensation program as required by applicable State and/or Federal laws, *and* will *assure* that employees shall receive worker compensation payments on a prompt and timely basis, within reason. Any problem on this subject shall be submitted to the Joint Sick Review Committee who shall act within one week.

Section 24
INDUSTRIAL ACCIDENTS

When a temporary disability does not last beyond the 21st day or the employee is not hospitalized, the Employer shall compensate the injured employee for the work lost during the first three (3) calendar days.

Section 25
DOCTOR TREATMENT

An employee who is scheduled to work and reports for work and is required to take time off as a result of an industrial injury for treatment in a doctor's office shall be paid for such time lost from work for that scheduled workday.

Doctors Visits — Non Industrial. Employees who are receiving doctor treatment during working hours shall be permitted to take unpaid time off from work on such days provided:

(a) Employee makes arrangements with his supervisor on the previous day.

(b) The Employer shall put the employee to work for the remainder of the shift without regard to the four (4) hour minimum work time.

Section 26
JOB CLASSIFICATION COMMITTEE

A Job Classification Committee shall be created which shall consist of two members selected by the Employer and two members selected by the Union. The Committee shall meet to classify or reclassify jobs. In the event that the Job Classification Committee fails to agree then, within 30 days of written submission by either party thereto, the issue shall be submitted to arbitration unless the Job Classification Committee agrees to continue to meet. In such latter event,

the time shall be extended an additional 15 days before the issue is submitted to arbitration unless the parties agree otherwise.

Section 27
JOB SAFETY

It shall not be a violation of any provision of this contract for employees to refuse to: (1) start work, (2) return to work, or (3) continue working, when any condition exists which would endanger the employee's health, safety, or well being, and such employees will not be subject to discharge or disciplinary action.

The Company to notify the Union of any potentially dangerous chemicals or gases that are used in the processing techniques.

An employee required to work in a job where the temperature is 32 degrees Fahrenheit or below shall be provided with adequate protective clothing including, but not limited to, thermal suits, boots, hats, gloves, and all such equipment shall be maintained by the Employer.

Parking. If a company does not have parking facilities or if the parking facilities are not adjacent to the plant, there shall be a security person on duty when shift breaks occur during night hours.

Section 28
FUNERAL LEAVE

Effective July 1, 1971, all regular seniority employees shall be entitled to paid funeral leave, a total of three (3) days, for any death in the immediate family.

"Immediate Family" includes the following:

(a) Spouse — includes legal wife or husband. Does not include ex-wife or ex-husband.

(b) Child — Also includes stepchild or legally adopted child.

(c) Parent — includes natural parents, step-parents or adoptive parents.

(d) Brother — includes natural brother, step-brother, adoptive brother, or half-brother.

(e) Sister — same type of inclusions as described for "Brother."

(f) Father-in-law — applies only to the father of the current legal spouse.

(g) Mother-in-law — applies only to the mother of the current legal spouse.

(h) Grandparents — includes the parents of the employee's natural parents, step-parents, or adoptive parents. This category also includes great grandparents.

(i) Grandchildren.

Section 29
TERM OF AGREEMENT

The provisions of this Agreement shall continue in full force and effect for a period beginning July 1, 1979, to and including June 30, 1982.

This Agreement shall furthermore continue in force and effect thereafter from year-to-year unless either party shall desire to modify, to change or to terminate and shall give the other party notice in writing of the proposed changes or termination at least sixty (60) days prior to any anniversary date. However, the effective date of the new agreement shall be subject to negotiation.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals as of this _____ day of _____, 19_____.

EMPLOYER: UNION

EMPLOYER: UNION:

DALGETY FOODS, INC. GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS UNION LOCAL 890

By: /s/ (Illegible)_____ *By:* /s/ Ed Gas

EXHIBIT "A"

This Exhibit consists of two (2) parts:

1. Wage Rates

(a) Straight-Time Hourly Wage Rates shall be as follows —

Bracket	7/1/79	7/1/80	7/1/81
1A Mech.	$9.01	$9.96	$10.72
1 Mech.	$8.48	$9.41	$10.12
1A	$8.01	$8.70	$9.41
I	$7.69	$8.32	$8.97
IIA Mech.	$7.56	$8.40	$9.01
II Mech.	$7.30	$8.14	$8.74
II	$6.80	$7.39	$7.99
III	$6.00	$6.54	$7.10
IV	$5.55	$6.07	$6.60
V	$5.15	$5.65	$6.16

(b) *Beginners Rate:* All employees initially hired for Bracket V work without previous experience in the California Food Processing Industry shall receive ten (10) cents less per hour than the rate of pay for Bracket V during the first forty-five (45) days of their employment.

(c) *Temporary Crew Leader:* Any employee who is receiving Bracket II or III and is required to act as a Temporary Crew Leader in addition to his normal duties shall receive 25¢ per hour above his normal rate for any day

assigned to perform crew leader work.

(d) Mechanic employed in Bracket II for three (3) consecutive years in plant: Bracket II plus 25¢ per hour.

The Joint Frozen Food Classification Committee Manual, as amended on September, 1969, or thereafter, designates the various Job classifications and job duties for each of the respective brackets of employment.

Any maintenance specialist (electrician, boilerman, refrigeration attendant, etc.) on duty alone or in charge of his department shall be at least Bracket I.

Salaried employees shall receive the same percentage increase in wages as provided above for the bracket position equivalent to the salaried job.

No employee shall suffer any reduction in his wage rate as a result of the signing of this agreement.

Either a time clock or duplicate card for registering work time of employees shall be provided in each plant. Any deviation from this arrangement must be by mutual agreement between the Union and the Company.

II. Job Description and Bracket Classifications —

(a) The above bracket rates shall be paid for work described by the job titles and job description appearing in the Joint Frozen Food Classification Committee Manual and appendixes thereto.

(b) Job Classifications Added or Upgraded Effective 7-1-79:

Classification	
Raw Product Truck Driver	Br. 1 + 75¢
Cold Storage Fork Lift (High Stacker)	1
Floorleader — Delete Lead Person	2
Lab and Q.C. Head Grader (one per shift)	1
Head Raw Product Grader (one per shift)	2

Fiber Box Printer ..... 3 + 25
Lab and Q.C. Finished Product Grader
(new description) 3
Case Stacker A Delete B ..... 5 + 15¢
Tray-Dumper ..... 5 + 25¢
Tray-Off Attendant ..... 5 + 25¢
Hand Casing ..... 5 + 25¢
Slip-Sheet (Push-Pull) Forklift Operator ..... Br. 1

JOINT FROZEN FOOD
CLASSIFICATION
COMMITTEE
MANUAL
6th EDITION
AMENDED JULY 1979

(BRACKET I PLUS 75¢)
Frozen Foods Job Description Sheet
HEAD REFRIGERATION AND
BOILER ROOM MECHANIC

Primary Duties:

1. Full responsibility under supervision with *little or no supervision*, for maintenance, operation, repair and overhaul of all refrigeration and boiler equipment.

a. Troubleshoot equipment.

b. Disassemble, overhaul, and reassemble all refrigeration and boiler equipment.

c. Read sketches, blueprints, operating instructions, etc. and determine procedure.

d. Conduct water and gas analysis.

Secondary Duties:

a. May supervise other refrigeration and boiler room mechanics and attendants.

b. May be "on call" on days off.

May operate, repair or overhaul other equipment with little or no supervision.

(BRACKET I PLUS 75¢)
Frozen Foods Job Description Sheet
PRODUCE TRUCK DRIVER

Primary Duties:

1. Drive truck, hauling fresh, raw produce from field to processing plant in the commonly used containers such as boxes, crates, bins, baskets, or bulk.

Secondary Duties:

1. Check truck tires, fuel, oil, water and general mechanical condition of equipment.

2. Prepare and process the necessary paperwork associated with the job which includes manifest, weight tags, and accident reports.

General Duties:

1. Operator shall have a valid California State Motor Vehicle License applicable to the equipment being driven.

2. This classification will include equipment having an excess of three axles.

(BRACKET I PLUS 25¢)
Frozen Foods Job Description Sheet
HOURLY SUPERVISOR

Primary Duties

1. Has the responsibility and authority of the supervisor without the authority to hire or fire.

(BRACKET I)
UNION RATES AND
JOB CLASSIFICATION

AUTOMATIVE MECHANIC — CLASS ONE.
ELECTRICIAN — CLASS ONE.
MAINTENANCE MECHANIC — CLASS ONE.
HEAD BOILER ROOM ATTENDANT — CLASS ONE.

REFRIGERATION MECHANIC — CLASS ONE.
WRAPPER MECHANIC — CLASS ONE.
ASSISTANT HOURLY SUPERVISOR.
BUILDING TRADES MAINTENANCE MECHANIC.
SPECIAL TRUCK DRIVER — CLASS ONE.
POLY BAG MECHANIC — CLASS ONE.
LIFT TRUCK DRIVE (COLD STORAGE) — HIGH STACKER
SLIP SHEET FORKLIFT DRIVE (PUSH PULL)
LAB AND QUALITY CONTROL — HEAD GRADER.

BRACKET I

Frozen Foods Job Description Sheet

AUTOMOTIVE MECHANIC — Class One

Primary Duties

1. Under little or no supervision is responsible for inspecting and maintaining automotive equipment of all types.

1. Remove and replace worn, broken or defective parts.

2. "Trouble Shoot", tune up and make adjustments on power units.

3. Grind valves, re-babbit and scape bearings on all types of automotive equipment.

4. Must be able and does disassemble, overhaul and reassemble all mechanical parts in auto trucks and power trucks.

5. Must be able to and does remove, repair and replace complete electrical and ignition circuits.

6. Maintain performance and repair records.

7. Maintain parts, stock and prepare requisitions or lists for parts, tools and supplies.

Secondary Duties

1. May repair and maintain other equipment.

2. May oil, grease, clean and do maintenance painting on trucks and lists.

3. May change and repair tires and tubes.

(BRACKET I)
Frozen Foods Job Description Sheet
(Bench Mark Job)
ELECTRICIAN — Class One

Primary Duties

1. Under little or no supervision, is responsible for the efficiency and safety of all plant electrical circuits and equipment and also:

1. Make layout of electrical circuits.

2. Make up material and parts lists.

3. Do or direct all maintenance wiring, installation of motors, switches, switch panels, fuse boxes, lighting, testing and power circuits.

4. Determine proper size and specifications of wire, conduit, switches, panels, fuses, etc.

5. Must be able to read and understand blueprints and circuit diagrams.

6. Inspect motors, switches, junction boxes, switch panels, circuit breakers, transformers, fuse panels, lighting, heating and power circuits. Make preventative and running repairs and corrections.

7. Do or direct installation, connection adjustments and calibration of electrical gauges and recording instruments.

8. Must have license where required.

Secondary Duties

1. May supervise the other electricians.

2. May make repairs on ignition and electrical systems of automotive equipment.

3. May rewind motors.

(BRACKET I)

Frozen Foods Job Description Sheet

(Bench Mark Job)

MAINTENANCE MECHANIC — Class One

Primary Duties:

1. Full responsibility under the superintendent or foreman for building and the installation of major machinery and equipment.

1. Read sketches, prints, operating instructions, etc. and determine procedure.

2. Check materials and parts and make requisitions.

3. Lay out work from sketches, drawings, etc.

4. Cut and form parts and assemble parts to construct machinery and equipment.

5. Locate, line up and anchor machinery.

6. Test and time machinery.

2. Full responsibility under the superintendent or foreman for maintenance, proper operation, repairs and overhaul of complex type plant equipment.

(BRACKET I)

Frozen Foods Job Description Sheet

HEAD BOILER ROOM ATTENDANT — Class One

Primary Duties

1. Responsible for the efficient operation, maintenance and repair of all boiler room equipment on his shifts and also:

1. Roll in boiler tubes (maintenance only, not new construction).

2. Make water analysis.

3. Make stack gas analysis.

4. Requisition boiler room parts and supplies.

5. Operate and maintain water softening and water treatment equipment.

6. Responsibility for work lay-out, general direction assignment of boiler room attendants.

Secondary Duties

1. May repair or replace steam and water valves throughout plant.

2. May be on night call.

3. May be required to have license to operate boilers.

4. May do repairing, in spare time, of other equipment.

(BRACKET I)

Frozen Foods Job Description Sheet

REFRIGERATION MECHANIC — Class One

Primary Duties

1. Operate and maintain refrigeration equipment while "quick" freezing various products.

2. Repair refrigeration equipment including dismantling, overhaul and reassembly.

3. Requisition refrigeration room parts and supplies.

Secondary Duties

1. May also act as Boiler Room Attendant.

(BRACKET I)

Frozen Foods Job Description Sheet

(Bench Mark Job)

WRAPPER MECHANIC — Class One

Primary Duties

1. Under little or no supervision, is responsible for installation, operation and maintenance of all packaging ma-

chinery and related equipment.

a. Must have full working knowledge of wrappers, closers, box formers and all other related packaging equipment.

b. Set up, check, time, adjust and trouble shoot all packaging machinery.

c. Repair, replace, and rebuild all packing machinery and related equipment.

d. Read sketches, prints, operating instructions, etc. and determine proper operating and repair procedure(s).

e. Check materials and parts and make requisitions.

Secondary Duties

1. May supervise other wrapper mechanics.

2. May do packaging machinery electrical work if qualified.

3. May clean, paint and grease packaging machinery and related equipment.

BRACKET I

Frozen Foods Job Description Sheet

ASSISTANT HOURLY SUPERVISOR

1. Supervises Bracket II and/or lower pay classifications within authority given by salaried supervisor or superintendent.

2. Organize work crews, assign work to personnel, and observe performance of individuals and assist workers by instruction or other means.

3. Check and observe functioning of all equipment and report any necessary repairs or changes to the Supervisor or Mechanic.

4. See that equipment is properly started and stopped and timed with respect to flow of work.

5. Relieve or assign relief to workers in the department.

6. Has either direct or indirect supervision of other workers in his department within the authority given him by the Supervisor.

7. May do manual work.

8. May check time and production records.

(BRACKET I

Frozen Foods Job Description Sheet

BUILDING TRADE MAINTENANCE MECHANIC

1. On instruction, performs carpenter work from sketches, blueprints or instructions.

2. On instruction, performs cement pouring, finishing and/or builds forms.

3. On instruction, performs plumbing work — cutting pipe, connecting pipe, connecting water lines, etc.

Note: The above classification applies to an employee actually performing these jobs and would not [illegible] any employee simply employed to assist the [illegible]n.

(BRACKET I)

Frozen Foods Job Description Sheet

SPECIAL TRUCK DRIVER — Class One

Primary Duties

1. Operates 3-axle or more truck, hauling goods or containers from plant-to-plant, plant-to-storage, or plant-to-warehouse and such duties require the operator to drive out of town in excess of a 15-mile radius.

Special Note: This classification does not apply to drivers hauling raw product.

(BRACKET I)

POLY BAG MECHANIC — Class One

Primary Duties:

1. Under little or no supervision is responsible for the installation, operation and maintenance of all poly bag ma-

chinery and related equipment.

a. Must have full working knowledge of poly bag machinery and related equipment.

b. Set up, check, time, adjust, and troubleshoot all poly bag machinery.

c. Repair, replace, and rebuild all poly bag machinery.

d. Read sketches, prints, operating instructions, etc. and determine proper operating and repair procedures.

e. Check materials and parts and make requisitions.

Secondary Duties:

1. May supervise other mechanics.

2. May do poly bag machinery electrical work, if qualified.

3. May clean, paint and grease poly bag machinery and related equipment.

(BRACKET I)
Frozen Foods Job Description Sheet
LIFT TRUCK DRIVER —
Class Two, Cold Storage

Primary Duties

1. Pick up pallet loads of case goods, boxes of raw product, sugar, other supplies, equipment, etc. and transport.

2. Stack pallets of good in following way:

a. Pick up pallet.

b. Move and position truck.

c. Elevate, load and deposit on top of stock to the height required.

3. Unstack: Reverse Operation No. 2.

4. Load or unload highway trucks or railroad cars.

5. Maintain gas, oil and water supply or electrical equipment.

6. Temperature 0 to 10 degrees below.

Clothing: heavy boots, heavy jacket, heavy pants, heavy hat.

Secondary Duties

1. May keep simple records, such as records of own production tally of trip made, pallets loaded, etc.

(BRACKET I)
Frozen Foods Job Description Sheet
SLIP SHEET (PUSH-PULL) FORKLIFT OPERATOR

Primary Duties:

1. In addition to duties as "Lift Truck Driver — Class One Cold Storage", shall operate forklift with equipment known as "Slip-Sheet" (Push-Pull).

(BRACKET I)
Frozen Foods Job Description Sheet
LAB AND QUALITY CONTROL —
HEAD GRADER

Duties:

1. Secure sample packages of finished products (determine grade).
2. Grade packages according to specifications.
3. Notify supervisor if sample package is out of grade.
4. Time blanchers and take blanch tests.
5. Take mold count (strawberries).
6. Make out grade change notification slips.
7. Alphis check, etc.
8. Monitor line for bacteria and be able to perform bacteria counts (TPC, Staph and Coliform).
9. Must be able to supervise lab graders on other lines and answer quality questions which may arise on U.S.D.A. Standards and Buyer's Specifications.

BRACKET II

MAINTENANCE MECHANIC — CLASS TWO A
PLANT TRUCK DRIVER
BOILER ROOM ATTENDANT
AUTOMOTIVE MECHANIC — CLASS TWO
ELECTRICIAN — CLASS TWO
MAINTENANCE MECHANIC — CLASS TWO
REFRIGERATION ATTENDANT
VACUUM TANK ATTENDANT
WRAPPER MECHANIC — CLASS TWO
HEAD WAREHOUSE LEADPERSON
POLY BAG MECHANIC — CLASS TWO
RAW PRODUCT REC. — GRADE — HEAD FORKLIFT OPERATOR
FLOOR LEADER
HEAD RAW PRODUCT GRADER

(BRACKET II A)
MAINTENANCE MECHANIC
CLASS TWO A

After three years as a maintenance mechanic Bracket II (also includes boiler Mechanic, electrician mechanic, wrapper machine mechanic, poly bag mechanic and refrigeration mechanic).

(BRACKET II)
Frozen Foods Job Description Sheet
PLANT TRUCK DRIVER

Primary Duties

1. Drive trucks hauling non-finished or finished frozen products from plant to storage warehouse and/or from storage warehouse to plant on a full time daily basis.
2. Drive trucks hauling fresh, raw products from field to processing plant in the commonly used containers, such as boxes, crates, bins, baskets, or bulk, on a full time daily basis.

Secondary Duties

1. Load trucks, unload trucks, secure loads and untie loads.

2. Check truck tires, fuel, oil, water and general mechanical condition of equipment.

3. Prepare and process the necessary paper work associated with the job, which includes manifests, weight tags, accident reports, etc.

General

1. Operator shall have a valid California State Motor Vehicle License, applicable to the equipment being driven.

2. This classification shall be limited to equipment having a maximum of three axles; the three axles may be any combination of equipment.

(BRACKET II)

Frozen Foods Job Description Sheet

BOILER ROOM ATTENDANT

Primary Duties

1. Adjust and control boiler fires, watch level, make fuel draft and water supply adjustments to produce maximum boiler efficiency.

2. Read and record readings as required of all temperature flow, pressure and electrical gauges.

3. Operate water treatment and allied equipment.

4. Maintain and make preventive or running repairs on pumps, air compressors, machinery, steam lines and equipment.

5. Lubricate, clean, polish, and do maintenance painting on boiler machines and equipment.

6. Under supervision, dismantle, overhaul and assemble pumps, machinery and equipment.

7. Make water analysis.

Secondary Duties

1. May be required to have license to operate boilers.

2. May make repairs to boiler settings, brick work, fire boxes, etc.

3. May assist in removing and rolling in boiler tubes (maintenance only).

4. May do repairing, in spare time, of other machinery and equipment.

(BRACKET II)
Frozen Foods Job Description Sheet
AUTOMOTIVE MECHANIC — Class Two

Primary Duties

1. Do or assist in overhauling of auto trucks and power trucks.

2. Remove and replace defective parts.

3. Grind valves on all types of automotive equipment.

4. Oil and grease, gas, clean and do maintenance painting on trucks and lifts.

5. Change and repair tires and tubes.

Secondary Duties

1. May repair other equipment.

(BRACKET II)
Frozen Foods Job Description Sheet
ELECTRICIAN — Class Two

Primary Duties

1. Move, remove or install electrical circuits and motors.

2. "Shoot trouble" and make repairs or corrections on motors, switches, switch panels, fuse boxes, lighting, heating or power circuits, junction boxes.

3. Install, connect, and adjust electrical gauges and recording instruments.

Secondary Duties

1. May make repairs on ignition and electrical systems of automotive equipment.

2. May assist in tearing down motors and reassembling motors.

(BRACKET II)

MAINTENANCE MECHANIC — Class Two

Primary Duties

1. Building and installation of machinery and equipment.

1. Assist Bracket I mechanics in building and installation of major machinery and equipment.

2. Under instruction of superintendent or foreman, construct or install plant equipment.

2. Full responsibility, under the superintendent or foreman, for maintenance, proper operation, repair and overhaul of plant equipment.

3. Assist Bracket I mechanics in maintenance, repair and overhaul of plant equipment.

(BRACKET II)

Frozen Foods Job Description Sheet

REFRIGERATION ATTENDANT

Primary Duties

1. Start, stop, operate and adjust refrigeration equipment for cold storage rooms.

2. Maintain refrigerant, make running repairs and assist in major overhauling of equipment.

3. Observe and check gauges and record readings.

4. Keep records of lots in and out of storage and location of products.

5. Lubricate, clean and paint refrigeration equipment and rooms.

Secondary Duties

1. May repair other equipment.
2. May operate lift truck.

BRACKET II
Frozen Foods Job Description Sheet
VACUUM TANK ATTENDANT

Primary Duties

1. Adjust valves to control flow of ingredients into vacuum pants.
2. Tend steam pumps that pump liquids into pipe lines.
3. Close and bolt tank.
4. Read thermometers and other gauges attached to pants, adjusting steam valves to get required amount of heat, and regulation valves from vacuum pump to maintain specific degree of vacuum.
5. Operate agitator as required.
6. Occasionally draw out sample of contents through double valve arrangement, and make necessary tests.
7. Keep readings on time of cook, controlling clock switches, etc.
8. Drain product from tank by means of valves.

Secondary Duties

1. Clean lines and equipment.

(BRACKET II)
Frozen Foods Job Description Sheet
(Bench Mark Job)
WRAPPER MECHANIC — Class Two

Primary Duties

1. Basic working knowledge of wrappers, closer, box formers and all related packaging machinery equipment.

2. Set up, check, time, adjust and trouble shoot all packaging machinery under supervision of Foreman or Class One Wrapper Mechanic.

3. Repair, replace, and rebuild packaging machinery under supervision of Foreman or Class One Wrapper Mechanic.

4. Be able to read and interpret sketches, operating instruction, etc. and determine, with the help of Foreman or Class One Wrapper Mechanic, proper operating and repair procedure(s).

Secondary Duties

1. May do minor packing machinery electrical work if qualified.

2. May clean, paint and grease packaging machinery and related equipment.

(BRACKET II)

Frozen Foods Job Description Sheet

HEAD WAREHOUSE LEAD PERSON

Primaries Duties

1. In charge of dry warehouse.

2. Unloads and stocks product from motor trucks such as, but not limited to, fiber stock, sauce ingredients, etc.

3. Performs inventory and maintains records.

4. Maintains through supervision and through own efforts, the proper warehousing of all material.

5. May supervise forklift operators.

(BRACKET II)

Primary Duties:

1. Basic working knowledge of poly bag machinery and related equipment.

2. Set up, check, time, adjust and trouble-shoot all poly bag machinery under supervision of Class One Poly Bag

Mechanic.

3. Repair, replace and rebuild poly bag machinery under supervision of Foreman or Class One Poly Bag Mechanic.

4. Be able to read and interpret sketches, operating instructions, etc. and determine (with the help of Foreman or Class One Poly Bag Mechanic) proper operating and repair procedures.

Secondary Duties:

1. May do minor poly bag machinery electrical work, if qualified.

2. May clean, paint and grease packaging machinery and related equipment.

(BRACKET II)
Frozen Foods Job Description Sheet
HEAD RAW PRODUCT GRADER

Primary Duties:

1. Make random selections of product to be graded, dump on grading table and rate product according to size, type and quality, etc.

2. Notify supervisor promptly if grading shows product is not up to specifications.

3. Set up grading tables and keep grading reports.

4. Grade raw product where such grading is used as a basis for paying grower for product.

Secondary Duties:

1. May act as a certified weighmaster; may weigh trucks as required.

2. May dispatch trucks as required.

(BRACKET II)
Frozen Foods Job Description Sheet
FLOORLEADER — CREWLEADER

Duties:

1. Supervises Bracket 3, 4 & 5 classifications within authority given by salaried supervisor or superintendent.
2. Supervises department employees in labor operations, as assigned.
3. Instructs department employees in job assignments.
4. Checks department processing.
5. Notify Hourly Supervisor if process check shows product or work is not up to specifications.
6. May keep employee time records and forms relating to scheduling of personnel.
7. May keep simple production records when required.
8. May do manual work.

BRACKET III
UNION RATES AND
JOB CLASSIFICATION

ELECTRICIAN'S HELPER
MECHANIC'S HELPER (TRAINEE)
LYE PEELER OPERATOR
PICK-UP TRUCK OPERATOR
FORK LIFT OPERATOR
RAW PRODUCT RECEIVING CLERK AND WEIGHMASTER
FIBER BOX PRINTER — FULL TIME
WRAPPING MACHINE OPERATOR
CASE STITCHER — FULL TIME
RACK TRANSPORT OPERATOR (FULL TIME)
OILER AND GREASER
AUTOMATIC PLATE FREEZER OPERATOR

ORDER PICKER
STOREKEEPER
LABORATORY WORKER
RAW PRODUCT CHECKER

(BRACKET III)
Frozen Foods Job Description Sheet
ELECTRICIAN'S HELPER

Primary Duties:

1. Assist Electricians Class One or Electricians Class Two, as directed.
2. Carry tools, supplies, etc. to and from stock room.
3. Bend, thread and install tubular conduit. Install BX conduit.
4. "Snake" wire.
5. Change fuses; light globes.
6. Install light fixtures and receptacles.
7. Do or help out on lifting, moving, supporting, carrying of motors and other equipment.

(BRACKET III)
Frozen Foods Job Description Sheet
MECHANIC'S HELPER (TRAINEE)

Primary Duties:

1. Building an installation of machinery and equipment.
   1. Assist mechanics wherever possible.
   2. On instruction, cut to lay out length, drill located holes, grind down beads, etc.
   3. On instruction, do minor assembly of performed or prefitted parts.
2. Maintenance and operation of complex and semi-complex types of machinery and equipment.
   1. Assist mechanics wherever possible.

2. Upon instruction, do simple maintenance work such as lace belts, tighten pulleys.

3. Fix guards.

4. Change knives, etc.

3. Operation, minor adjustments and repair of machinery and equipment.

4. General

1. Oil and grease, when necessary.

(BRACKET III)

Frozen Foods Job Description Sheet

LYE PEELER OPERATOR

Primary Duties

1. Start and Stop — turn on steam and water and bring up to operating conditions.

2. During run, keep at operating conditions.

3. Add lye periodically, judging requirements by condition of peeled fruit — record lye used.

4. When required, secure barrel of lye — connect to steam line to melt for use.

5. Periodically drain — wash out — refill.

6. Make minor repairs and adjustments — In case of major breakdown, notify proper authority.

7. Watch flow of fruit to avoid piling up.

Secondary Duties

1. May oil and grease

2. May clean equipment.

(BRACKET III)

Frozen Foods Job Description Sheet

PICK-UP TRUCK DRIVER

Primary Duties

1. Drive trucks hauling materials, supplies, pallets, lugs, equipment, etc.

2. Load and unload truck, with assistance, if necessary.

3. Maintain fuel, egine oil, water and air at proper levels at all times.

4. Change tires, make small emergency adjustments, etc.

(BRACKET III)
Frozen Foods Job Description Sheet
FORK LIFT OPERATOR

Primary Duties

1. Pick up pallet loads of case goods, boxes of raw product, sugar, other supplies, equipment, etc, and transport.

2. Stack pallets of goods thusly.

   a. Pick up pallet.

   b. Move and position truck.

   c. Elevate, load and deposit on top of stack.

3. Unstack: Reverse Operation No. 2

4. Load or unload highway trucks or railroad cars.

5. Maintain gas, oil and water supply.

Secondary Duties

1. May keep simple records, such as records of own production, tally of trips made, pallets loaded, etc.

(BRACKET III)
Frozen Foods Job Description Sheet
RAW PRODUCT RECEIVING CLERK
AND WEIGHMASTER

Primary Duties

1. Take weights, compute tare, gross or net weights.

2. Issue Public Weighmaster's Certificate.

3. Make necessary reports.

4. Do grading where such grading is used as a basis for paying grower for product.

5. Make random selections of product to be graded, dump on grading table and rate product according to size, type and quality, etc.

6. Notify supervisor promptly if grading shows product is not up to specifications.

7. Set up grading tables and keep grading reports.

8. Must be familiar with grading specifications.

Secondary Duties

1. May prepare empty box receipts and obtain drivers' signatures.

2. May keep inventory of ice house storage and make up position sheet for each day.

3. May route trucks to orchards where produce is available.

4. May direct receiving crew.

5. May take count of boxes on hand, keeping record of boxes run during day or night shift.

6. May take daily weight average of boxes received.

7. May grade raw product as fill-in job.

8. May assist or serve as scale man.

(BRACKET III PLUS 25¢)

Frozen Foods Job Description Sheet

FIBER B)X PRINTER — FULL TIME

Primary Duties

1. Receive orders for printed shook or fiber — choose correct type, mount on press, adjust, ink, and print required number.

2. At end of run clean type and spread to case — clean and oil press.

3. Make running adjustments to equipment.

4. Feed to press.

Secondary Duties

1. May keep simple records.
2. May make wood boxes.
3. May truck cartons to or from press.
4. May tail off cartons from press.

(BRACKET III)
Frozen Foods Job Description Sheet
WRAPPING MACHINE OPERATOR

Primary Duties

1. Start and stop wrapping machine in accordance with operational requirements.
2. Insert roll of paper in machine, replacing when required.
3. Clean machine at end of shift.

Secondary Duties

1. May oil and grease equipment and make adjustments.
2. May move wrapped packages to tunnel room or froster.
3. May keep record of packaged goods entering freezer.

(BRACKET III)
Frozen Foods Job Description Sheet
CASE STITCHER — FULL TIME

Primary Duties:

1. Pick up case, place over stitcher anvil in inverted position, holding flaps down.
2. Depress foot lever to operate stitching arm of machine, moving case at same time over anvil to properly space and position stitches along both ends of case bottoms.
3. Replace spools of wire in machine as needed.
4. Secure fiber and form cases.

Secondary Duties:

1. May stencil cases.

(BRACKET III)

Frozen Foods Job Description Sheet

RACK TRANSPORT OPERATOR (FULL TIME)

1. Delivers racks of finished product from processing lines to tunnel freezing area, and/or delivers empty racks from tunnel freezing area to processing lines.
2. Keeps records of product delivered, placed or removed from production or freezing tunnels.
3. May place racks in freezing tunnels.
4. May remove racks from freezing tunnels.

(BRACKET III)

Frozen Foods Job Description Sheet

OIL AND GREASER

Primary Duties:

1. Periodic lubrication of all running equipment with proper type and quantity of lubricant.
2. Assist operator remove jams, when possible.
3. Take care of grease guns and supply of grease and oil.
4. Replace broken fittings, when necessary.
5. Constantly check on operation of equipment to notice hot or dragging bearings and belts; if found, give it special attention and report to supervisor.

(BRACKET III)

Frozen Foods Job Description Sheet

AUTOMATIC PLATE FREEZER OPERATION

Primary Duties:

1. Starts Hydraulic pump motor.
2. Starts conveyors bringing product to and from plate freezers.
3. Starts and stops the automatic feeding mechanism that feeds packages into the plate freezers.
4. Defrosts cabinets and plates.

Secondary Duties:

1. Maintains liaison with the production foreman as to flow of incoming packages.

2. Maintains liaison with the casing foreman as to flow of packages away from the plate freezer.

(BRACKET III)
Frozen Foods Job Description Sheet
ORDER PICKERS

Primary Duties:

1. From customer order, determine items and number of cases to be order picked.

2. Remove strapping and corner board from pallet. Take correct number of cases from pallet and stack on order pick pallet.

3. Put in the amount on customer shipping order and update load card per lot identification system-frozen, customer shipping.

4. Make tally by case weight on all catch weight items. Update load card and customer shipping order.

Other Duties:

1. Receive incoming product, put on corner and strap, make load card and tally.

2. Prepare rail cars for loading, remove corner boards and make tally and/or stack cases in car.

3. Keep work area and storage clean.

(BRACKET III)
Frozen Foods Job Description Sheet
LABORATORY WORKER

Duties

Under supervision and direction of head Grader or quality control supervisor, may perform the following:

1. Check and record net or drain weights.
2. Check scales for correct weight and balance.
3. Check and record blanch time.
4. Check either wraps, labels or coding and record when required.
5. Run either peroxidase, chlorine, enzyme or Brix test and record, when required.
6. Make and record insect or mold counts.
7. Make and record ration check of product or other simple quality checks.
8. Draw samples.

(BRACKET III)
Frozen Foods Job Description Sheet
RAW PRODUCT CHECKER

Primary Duties

1. Make random selections of product to be graded, dump on grading table and rate product according to size, type and quality, etc.
2. Notify supervision promptly if grading shows product is not up to specifications.
3. Set up grading tables and keep grading reports.

Secondary Duties

1. May do grading where such grading is used as a basis for paying grower for product.

UNION RATES AND
JOB CLASSIFICATION
BRACKET IV

CAR LOADER, TRUCK LOADER AND UNLOADER.
LUG BOX AND PALLET REPAIRMAN — FULL TIME
SUGAR DUMPER — FULL TIME.
TUNNEL OR FREEZER ATTENDANT.

CASE STITCHER.
TRANSPORTER OPERATOR — FULL TIME.
AUTOMATIC CASING MACHINE OPERATOR. "A"
CLEAN UP (SANITATION) CREW

(BRACKET IV)

Frozen Foods Job Description Sheet

CAR LOADER, TRUCK LOADER AND UNLOADER

Duties

1. Lift case from stack, pallet or roller and swing into position to build up load in car or truck in tight neat stack.

2. Unload cases from car and truck. Lay truck stack of cases into car from dock or storage area, from car to storage area. May stencil cases. May talley.

3. Temperature — 0-10 degrees above zero. Clothing: Heavy boots, heavy pants, heavy jacket, heavy hat, cloth gloves.

(BRACKET IV)

Frozen Foods Job Description Sheet

LUG BOX & PALLET REPAIRMAN — FULL TIME

Primary Duties

1. Select and truck boxes or pallets needing repairing to bench.

2. Remove broken boards and replace with new or used pieces. Nail in place and stack.

Secondary Duties

1. May truck shook, get nails, etc.

(BRACKET IV)

Frozen Foods Job Description Sheet

SUGAR DUMPER — FULL TIME

Primary Duties

1. Dump sugar into vats.

2. Fill tanks with water and turn on steam to heat or pumps to agitate.

Secondary Duties

1. May keep tally.
2. May check degree of sugar content.
3. May add ascorbic acid.
4. May regulate valves changing flow of syrup.
5. May receive, truck, and stack sugar.
6. Will truck, stack, count and tie empty sacks.
7. May assist in operation of filter system and cleaning of same.

(BRACKET IV)
Frozen Foods Job Description Sheet
TUNNEL OR FREEZER ATTENDANT

Primary Duties

1. Push rack containing packages into tunnel room.
2. Close tunnel room door and start fan by pushing button control.
3. Convey frozen food to casing room from wrapping room.

Secondary Duties

1. May operate automatic transport in moving palletized cases to freezer warehouse.
2. May set clock for timing freeze in tunnel room.
3. May record each freeze on froster or tunnel room record.
4. May keep record of cases goods entering cold room.
5. May stop fan at end of freeze.

(BRACKET IV)
Frozen Foods Job Description Sheet
CASE STITCHER

Primary Duties

1. Pick up case, place over stitcher anvil in inverted position holding folded flaps down.

2. Depress foot lever to operate stitching arm of machine, moving case, at same time, over anvil to properly space and position stitches along both ends of case bottoms. Remove case.

3. Replace spools of wire in machine, as needed.

Secondary Duties

1. May stencil cases.

2. May secure fiber and form cases.

(BRACKET IV)
Frozen Foods Job Description Sheet
TRANSPORTER OPERATOR — FULL TIME

Primary Duties

1. Operate power transporter (small equipment not equipped for riding).

2. Transport pallets, racks or case goods, etc. as directed with minimum supervision.

(BRACKET IV)
Frozen Foods Job Description Sheet
AUTOMATIC CASING MACHINE OPERATOR "A"

Primary Duties

1. Pick up and open case. Fold bottom flaps into position. Place on magazine of machine, hold in place.

2. When magazine of machine is filled to proper point, observe frozen packages in case and on conveyor.

3. Set aside cases containing damaged or improperly filled packages.

4. Avoid jams due to dented packages and loose wrappers. Any casing machine running over 300 cases per hour.

(BRACKET IV)
Frozen Foods Job Description Sheet
CLEAN-UP (SANITATION) CREW

Primary Duties:

1. Is part of the plant's sanitation crew. (This classification is not intended for production clean-up or janitors.)

2. Wash, hose, steam, etc. floors, walk-ways, work areas, equipment, etc.

3. Pick up and dispose of litter, paper, product, trays, etc., into correct disposal areas.

UNION RATES
JOB CLASSIFICATION
(BRACKET V)

WRAPPER FEEDER — FULL TIME
AUTOMATIC CASING MACHINE OPERATOR "B"
RAW PRODUCT CHECKER
AUTOMATIC FILLER OPERATOR
BROCCOLI/CAULIFLOWER MACHINE OPERATOR
HAND CASER (FROZEN CONTAINERS)
CASE STACKER "A"
CARTON MACHINE STUFFER (CAPTAIN TYPE)
TRAY-OFF ATTENDANT
AUTOMATIC BAGGER OPERATOR
FLEX-VAC OPERATOR
BUTTER SAUCE DISPENSER
TRAY-DUMPER

(BRACKET V PLUS 25¢)
Frozen Foods Job Description Sheet
WRAPPER FEEDER — FULL TIME

Primary Duties:

1. Stops, starts and observes wrapping machine during production run.

2. Feeds and/or observes packages entering wrapper, discards bad packages and watches for unclosed packages.

2. Observes paper flow into machine and informs foreman or wrapper mechanic of machine malfunctions.

Special Notes

1. The term "FULL TIME" as used in this description means thus; the employee's main job is that of a wrapper feeder, not an employee whose main job is working on the production line and occasionally feeds a wrapper for short periods of time (10 or 15 minutes).

2. The Mara Pac operator and the Concora 450 operator will qualify under this job description also.

(BRACKET V PLUS 25¢)
Frozen Foods Job Description Sheet
AUTOMATIC CASING MACHINE OPERATOR "B"

Primary Duties

1. Pick up and open case. Fold bottom flaps into position. Place on magazine of machine, hold in place.

2. When magazine of machine is filled to proper point, observe frozen packages in case and on conveyor.

3. Set aside cases containing damaged or improperly filled packages.

4. Avoid jams due to dented packages and loose wrappers. Any casing machine running less than 300 cases per hour.

(BRACKET V. PLUS 15c)
Frozen Food Job Description Sheet
AUTOMATIC FILLER OPERATOR

Primary Duties:

1. Start and stop filler and container lines, as required.

2. Fill containers with designated products, rejecting unsuitable product or containers.

3. May check for proper fill of containers by adding or removing product.
4. Place cartons in former.
5. Keep area around filler clean, as time permits.

Special Note:

Automatic Sosburn Filler — Bracket V plus 25 cents.

All other Automatic Fillers — Bracket v. plus 15 cents.

(BRACKET V. PLUS 15c)
Frozen Foods Job Description Sheet
BROCCOLI/CAULIFLOWER MACHINE OPERATOR

Primary Duties:

1. Start and stop machine.
2. Pick up broccoli/cauliflower from moving belt or conveyor and place properly on machine or into feeding device for automatic coring or cutting.
3. May clean out jams.
4. Notify supervisor if machine malfunctions.

(BRACKET V PLUS 25c)
Frozen Foods Job Description Sheet
HAND CASER (Frozen Containers)

Duties:

1. Secure case and position.
2. Slide or lift frozen container into case.
3. Slide case aside.

(BRACKET V PLUS 15c)
Frozen Foods Job Description Sheet)
CASE STACKER "A"

Primary Duties

1. Receive full cases from conveyor or compression unit.
2. Stack cases properly for transport.
3. Place corner posts and/or tie cases and/or stencil cases and/or do other various duties concerned with case stacking.

(BRACKET V PLUS 5c)
Frozen Foods Job Description Sheet
C. TON MACHINE STUFFER
(CAPTAIN TYPE)

Primary Duties:

1. Stuffs poly bag into pre-formed carton moving in carriage of captain type carton machine.

Secondary Duties:

1. May be required to use utensils such as spatula, spoon, etc. in the performance of the primary duties.

(BRACKET V PLUS 25c)
Frozen Foods Job Description Sheet
TRAY-OFF ATTENDANT

Primary Duties:

1. Place tray in position.
2. Obtain package from conveyor.
3. Slide package on to tray.
4. Stack tray in proper place.

Special Note:

Tray weight when full may not exceed twenty-five (25) pounds.

(BRACKET V PLUS 5c)
Frozen Foods Job Description Sheet
AUTOMATIC BAGGER OPERATOR

Primary Duties:

1. Obtain bag and place on distribution belt.
2. Periodically weigh bags to maintain proper weight check.
3. Place bag on distribution belt in such a manner so that product will not spill out of bag.

(BRACKET V PLUS 5c)
Frozen Foods Job Description Sheet
FLEX-VAC OPERATOR

Primary Duties:

1. Obtain packages with both hands.
2. Place in Flex-Vac to prevent rejects — i.e., wrinkles, etc.

(BRACKET V PLUS 5c)
Frozen Foods Job Description Sheet
BUTTER SAUCE DISPENSER

Primary Duties:

1. Employee operates sauce gun which requires:
   1. Inserting gun into package.
   2. Simultaneously stepping on instrument which activates injection of sauce.
   3. With opposite hand, obtain bag and open it enough to insert sauce gun if required.

(BRACKET V PLUS 25c)
TRAY-DUMPER

Primary Duties:

1. Pull trays of frozen packages from tray car.
2. Flip trays over, distributing onto casing deck.
3. Replace trays in tray case.

Secondary Duties:

1. Must accomplish above duties in a manner that will not damage product and/or equipment.

PROCESS AND RULES
OF THAT
JOINT FROZEN FOOD
CLASSIFICATION COMMITTEE

"It is agreed that, for convenience, job titles, job descriptions and the classifications of the jobs among the several wage brackets will be set forth in this manual, and shall be

an integral part of the Collective Bargaining Agreement.''

The following procedural rules shall govern:

1. The Frozen Food Job Classification Committee shall consist of an equal number of members. Half appointed by the Union and half appointed by the Employer as mutually agreed upon.

2. The Committee is empowered to investigate job classifications disputes which have been submitted to the Committee in writing and to determine appropriate titles, job descriptions and classifications for such disputed jobs.

3. All questions involving classification of employees or jobs shall be handled by the Joint Frozen Food Job Classification Committee.

4. Where content of a job classified in the Agreement has not been changed in any substantial particular, no request for review shall be recognized by the Committee.

5. No claims, including claims for back wages, by an employee or by the Local, shall be valid for a period prior to the date the grievance was first filed in writing unless circumstances of the case made it impossible for the employee or the Local to know the existence of grounds for the claim, in which case the claim shall be limited retroactively to a period of thirty days prior to the date the claim was first filed in writing.

6. No new brackets shall be created.

7. Requests for consideration by the Committee on new jobs or on the classification of individual employees may be presented to the Committee in either one or two ways:

(1) A recent made in writing by a Local Union, copies of the request being sent to the companies involved in the Frozen Food Industry Classification Committee.

or

(2) By a company filing a request with the Frozen Food

Industry Classification Committee for establishment of job description, job title, and bracket classification of any new jobs or jobs not originally classified.

Upon such request by a company, the Frozen Food Industry Classification Committee shall establish bracket classification and shall supply the union with a job description, job title and bracket classification applied. If the union disagrees with the job description, job title or bracket classification, the basis of this disagreement shall be submitted to the Employer in writing within ten days from mailing of Employer's notice. If no such submission is made by the Union, the job description, job title and bracket classification shall be deemed approved.

8. The minimum required to constitute a quorum shall be mutually agreed upon by the Employer and the Union.
9. No member of the Committee shall act on cases concerning his own company or his own Local, as the case may be. This rule applies only to cases involving specific companies and specific locals and shall not apply on matters submitted for consideration on an industry-wide basis.
10. Any expenses incurred by the Committee in connection with its official business shall be borne equally by both parties to the Agreement.
11. Meets of the Committee shall be held at times designated by joint agreement between representatives of the Employer and a representative of the Union.
12. Whenever possible, to avoid the necessity of frequent meetings, the facts concerning any dispute or any new job classification shall be stipulated by a representative of the Employer and a representative of the Union. These stipulations shall then be sent to the members

of the Committee and their decision returned by mail to the Frozen Food Industry Classification Committee Chairman.

13. It is the expressed desire of this Committee that all disputes shall be settled without recourse to outside agencies.

14. A break-in period is to be recognized by both the Union and the Employer, applying to all brackets.

15. It is the intent of the Joint Committee to be as general as they possibly can in the establishment of job classification for the Frozen Food Industry.

16. The definition of "Full Time" in the various job descriptions shall be "non-intermittent employment during a work shift."

17. "Under Supervision" shall be interpreted to mean that the Supervisor exercises supervision generally for the work of designated subordinate employees and accepts the responsibility for the work performed by such employees.

Also, in recognition of the need for a specific and tangible formula for resolving job classification disputes, the Joint Frozen Food Classification Committee adopted the following point score system to be used as a guide in evaluating various jobs:

Skill — Total Maximum Points 250

1. Education — Maximum Points 70
   1st Degree — High School
   2nd Degree — High School (Vocational Arts)
   3rd Degree — High School and Vocational Arts School
   4th Degree — College
   5th Degree — College (Specialized Degree)

2. Experiences — Maximum Points 110
   1st Degree — Requiring Close Supervision

2nd Degree — Requiring Normal Supervision
3rd Degree — Requiring Little or No Supervision
4th Degree — First Line Supervision
5th Degree — Second Line Supervision

3. Initiative and Ingenuity — Maximum Points 70
1st Degree — Non-Repetitive work, requiring minimum judgment
2nd Degree — Non-Repetitive work, requiring judgment and solution of few problems
3rd Degree — Non-Repetitive work, requiring judgement and ingenuity and solution of most problems pertaining to job assignment.
4th Degree — First Line Supervision
5th Degree — Second Line Supervision

Effort — Total Maximum Points 75

4. Physical Demand — Maximum Points..... 50
1st Degree — Moderate fatigue with lifting up to 50 pounds. Standing and use of hands primary effort.
2nd Degree — Moderate fatigue with heavy lifting.
3rd Degree — Arduous fatigue with heavy lifting.
4th Degree — Arduous fatigue with heavy lifting under fatiguing conditions.
5th Degree — Arduous fatigue with heavy lifting under fatiguing and hazardous conditions.

5. Mental or Visual Demand — Maximum Points..... 25
1st Degree — Close attention to work.
2nd Degree — Close attention to work with ability to make some decision on non-repetitive work.
3rd Degree — Close attention to work with ability to make any decision pertaining to job assignment.
4th Degree — First Line Supervision.
5th Degree — Second Line Supervision.

Responsibility — Total Maximum Points..... 100

6. Equipment or Process — Maximum Points 25
   1st Degree — Minimum effect on equipment and/or process.
   2nd Degree — Potential damage to equipment and/or process.
   3rd Degree — Definite effect on equipment and/or process.
   4th Degree — First Line responsibility on damage to equipment and/or process.
   5th Degree — Second Line responsibility on damage to equipment and/or process.
7. Material or Product — Maximum Points 25
   1st Degree — Minimum effect on material and/or product.
   2nd Degree — Potential damage to material and/or product.
   3rd Degree — Definite effect on material and/or product.
   4th Degree — First Line responsibility on damage to material and/or product.
   5th Degree — Second Line Responsibility on damage to material and/or product.
8. Safety of Others — Maximum Points..... 25
   1st Degree — Normal effect on safety of few employees.
   2nd Degree — Normal effect on safety of many employees.
   3rd Degree — Serious effect on safety of others.
   4th Degree — First line responsibility on safety of others.
   5th Degree — Second line responsibility on safety of others.
9. Work of Others — Maximum Points..... 25

1st Degree — Normal effect on work of few employees.

2nd Degree — Normal effect on work of many employees.

3rd Degree — Serious effect on work of others.

4th Degree — First Line responsibility on work of others.

5th Degree — Second line responsibility on safety of others.

Job Conditions — Total Maximum Points 75

10. Working Conditions — Maximum Points 50

1st Degree — Noise, monotony, standing.

2nd Degree — Noise, monotony, standing, weather.

3rd Degree — Noise, monotony, standing, weather, temperature.

4th Degree — Noise, temperature, weather, abnormal working conditions.

5th Degree — Extreme working conditions.

Unavoidable Hazards — Maximum Points 25

1st Degree — Normal.

2nd Degree — Minimum.

3rd Degree — Exposed to few safety hazards.

4th Degree — Exposed to many safety hazards.

5th Degree — Exposed to serious safety hazards.

The range of point scores for the five wage brackets was established as follows:

Under 50 points ..... Minimum Rate

51 to 100 points ..... Bracket V

101 to 150 points ..... Bracket IV

151 to 200 points ..... Bracket III

201 to 300 points ..... Bracket II

301 to 400 points ..... Bracket I

The Committee agrees that when disputes arise concerning new jobs or concerning pre-existing jobs not classified through collective bargaining, the proper classifications will be established for such disputed jobs, through direct comparison, factor by factor, with a list of "Bench Mark" jobs selected from the already agreed classifications.

The following are "Bench Mark" jobs selected by the Committee.

Bracket I

Maintenance Mechanic — Class One
Electrician — Class One

Bracket II

Lead Person
Maintenance Mechanic — Class Two

Bracket III

Fork Lift Operator
Wrapping Machine Operator

Bracket IV

Tunnel or Freezer Man
Oiler and Greaser

Bracket V

All jobs not classified in any other Bracket.

Total points assigned to the various classifications and approved by the Joint Committee are as Follows:

Job Description	*Total Points*
Maintenance Mechanic — Class One	326
Electrician — Class One	335
Lead Person	257
Maintenance Mechanic — Class Two	245
Fork Lift Operator	161
Wrapping Machine Operator	166

Oiler and Greaser..... 119
Tunnel or Freezer Man..... 114

A breakdown of the total points for each "Bench Mark" job by the various factors is as follows:

JOB EVALUATION SHEET
Bench Mark Job
MAINTENANCE MECHANIC — Class One

Job Attributes	*Degree*	*Points Assigned*
SKILL		
Education	3rd	42
Experience	3rd	66
Initiative and Ingenuity	3rd	42
EFFORT		
Physical Demand	3rd	30
Mental or Physical Demand	4th	20
RESPONSIBILITY		
Equipment or Process	4th	20
Material or Product	4th	20
Safety of Others	4th	20
Work of Others	4th	20
JOB CONDITIONS		
Working Conditions	4th	40
Unavoidable Hazard	4th	20
	Total Points	326
	Labor Grade Bracket I	

JOB EVALUATION SHEET
Bench Mark Job
ELECTRICIAN — Class One

Job Attributes	*Degree*	*Points Assigned*
SKILL		
Education	3rd	42
Experience	3rd	66

EFFORT		
Physical Demand	3rd	30
Mental or Visual Demand	4th	20
RESPONSIBILITY		
Equipment or Process	4th	20
Material or Product	4th	20
Safety of Others	4th	20
Work of Others	3rd	15
JOB CONDITIONS		
Working Conditions	4th	40
Unavoidable Hazards	4th	20
	Total Points	335
	Labor Grade Bracket I	

JOB EVALUATION SHEET
Bench Mark Job
LEAD PERSON

Job Attributes	*Degree*	*Points Assigned*
SKILL		
Education	_____	_____
Experience	3rd	66
Initiative and Ingenuity	4th	56
EFFORT		
Physical Demand	2nd	20
Mental or Visual Demand	4th	20
RESPONSIBILITY		
Equipment or Process	4th	20
Material or Product	4th	20
Safety of Others	4th	20
Work of Others	4th	20

JOB CONDITIONS		
Working Conditions	1st	10
Unavoidable Hazards	1st	5
	Total Points	257
	Labor Grade Bracket II	

JOB EVALUATION SHEET
Bench Mark Job
MAINTENANCE MECHANIC — Class Two

Job Attributes	*Points Degree*	*Points Assigned*
SKILL		
Education	2nd	28
Experience	2nd	44
Initiative and Ingenuity	2nd	28
EFFORT		
Physical Demand	3rd	30
Mental or Visual Demand	2nd	10
RESPONSIBILITY		
Equipment or Process	3rd	15
Material or Product	3rd	15
Safety of Others	3rd	15
Work of Others		
JOB CONDITIONS		
Working Conditions	4th	40
Unavoidable Hazards	4th	20
	Total Points	245
	Labor Grade Bracket II	

JOB EVALUATION SHEET
FORK-LIFT OPERATOR

Job Attributes	*Degree*	*Points Assigned*
SKILL		
Education	_____	_____
Experience	1st	22
Initiative and Ingenuity	1st	14

EFFORT		
Physical Demand	2nd	20
Mental or Visual Demand	2nd	15
RESPONSIBILITY		
Equipment or Process	3rd	15
Material or Product	3rd	15
Safety of Others	3rd	15
Work of Others	2nd	10
JOB CONDITIONS		
Working Conditions	2nd	20
Unavoidable Hazards	3rd	15
	Total Points	161
	Labor Grade Bracket III	

JOB EVALUATION SHEET
Bench Mark Job
WRAPPING MACHINE OPERATOR

Job Attributes	*Degree*	*Points Assigned*
SKILL		
Education	1st	14
Experience	2nd	44
Initiative and Ingenuity	2nd	28
EFFORT		
Physical Demand	2nd	20
Mental or Visual Demand	2nd	10
RESPONSIBILITY		
Equipment or Process	3rd	15
Material or Product	3rd	15
Safety of Others	———	———
Work of Others	1st	5

JOB CONDITIONS		
Working Conditions	1st	10
Unavoidable Hazards	1st	5
	Total Points	166
	Labor Grade Bracket III	

JOB EVALUATION SHEET
Bench Mark Job
OILER AND GREASER

Job Attributes	*Degree*	*Points Assigned*
SKILL		
Education	_____	_____
Experience	_____	_____
Initiative and Ingenuity	1st	14
EFFORT		
Physical Demand	2nd	20
Mental or Visual Demand	3rd	15
RESPONSIBILITY		
Equipment or Process	3rd	15
Material or Product	2nd	10
Safety of Others	2nd	10
Work of Others	_____	_____
JOB CONDITIONS		
Working Conditions	2nd	20
Unavoidable Hazards	3rd	15
	Total Points	119
	Labor Grade Bracket IV	

JOB EVALUATION SHEET
Bench Mark Job
TUNNEL AND FREEZER MAN

Job Attributes	*Degree*	*Points Assigned*
SKILL		
Education	_____	_____
Experience	_____	_____
Initiative and Ingenuity	1st	14

EFFORT		
Physical Demand	3rd	30
Mental or Visual Demand	1st	10
RESPONSIBILITY		
Equipment or Process	2nd	10
Material or Product	1st	5
Safety of Others	———	———
Work of Others	———	———
JOB CONDITIONS		
Working Conditions	3rd	30
Unavoidable Hazards	3rd	15
	Total Points	114
	Labor Grade Bracket IV	

The Committee adopted the following step by step procedure for future job comparisons:

1. A description of the job under question will be prepared jointly by each of the respective Chairmen.

2. The jointly prepared description will then be sent out to members of the Classification Committee for their consideration.

3. The job under question will then be evaluated and placed in the proper bracket through the following procedure:

A. The job will be compared with each of the Bench Mark jobs, insofar as the first factor "Skill" is concerned. The score assigned to the disputed job for the factor of "Skill" will be the score appearing on the Bench Mark Sheet for the most closely comparable Bench Mark Job.

B. The same procedure of comparison with Bench Mark Jobs will be followed with respect to evaluation sheets for "Effort" and then for "Responsibility" and then for "Job Conditions". Thus, by the process of direct comparison with Bench Mark Jobs, a total score for the Job in question will be arrived at, which in turn will establish the proper bracket

classification.

C. If the job in question occurs on a "onetime" or "one-plant" basis the Secretary of the Committee will keep appropriate records of the job description and bracket classification, which will be the property of the Committee but the job will not become an industry-wide classified job.

It is the position of the individual Frozen Food Employers that each of their respective companies represented in the formulation of the Joint Frozen Food Classification Committee Manual are acting individually, and their liability is limited to their own individual action.

APPENDIX B.

Petition to Reopen Pursuant to [California] Labor Code § 5803 [by Angelina Avina] (October 22, 1979).

Before the Workers' Compensation Appeals Board of the State of California.

Angelina Avina, Applicant, vs. Dalgety Foods, Inc., Defendant. Case Nos.: 76 SAL 8071, 77 SAL 9360.

COMES NOW Applicant by her attorneys of record and petitions to reopen the above-captioned matter and in this connection alleges that:

1. On July 6, 1979 a Compromise and Release was entered into in the above captioned matters, which Compromise and Release was approved on July 16, 1979.

2. The Compromise and Release was intended to extinguish applicant's claim against Spiegl Foods for the injury of June 22, 1973, and to partially extinguish applicant's claim for injury occurring between March 1, 1968 and July 19, 1976. The former date being the subject matter of 76 SAL 8077 and the latter claimed period of injury the subject matter of 77 SAL 9360.

3. On September 7, 1979, Gil Q. Lopez, personnel manager of Dalgety Foods, Inc., the successor and interest to Spiegl Foods, Inc., terminated applicant from her work at Dalgety Foods.

4. On September 12, 1979, Gil Q. Lopez, personnel manager confirmed the firing of applicant by a letter addressed to applicant — a copy of which is hereinafter annexed as Exhibit "A" to the herein petition.

5. On September 6, 1979, one day prior to applicant's termination, applicant brought with her to her employer a medical release signed by Stephen D. Storey, M.D. which released applicant to return to work on September 10, 1979

with "no restrictions". This medical release is hereinafter annexed as Exhibit "B" to the herein Petition to Reopen.

This petition is authorized by virtue of Labor Code §5803 which provides continuing jurisdiction to the Appeals Board over all of its Orders, Decisions, and Awards and provides the right to review an increase in a compensation awarded. This petition is further authorized by virtue of Labor Code §132a which provides that:

> "Any employer who discharges, . . . or in any manner discriminates against any employee . . . because the employee has received a rating, award or settlement is guilty of a misdemeanor and subject to the provisions of Labor Code §4553. Any such employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.
>
> . . . Proceedings under this section for increased compensation as provided in §4553, or for reinstatement and reimbursement for lost wages and work benefits, are to be instituted by filing an appropriate petition with the Appeals Board, that such proceedings may not be commenced more than one year from the Discriminatory Act or date of termination of the employee. The Appeals Board is vested with full power, authority, and jurisdiction to try and determine all matters specified in this section subject only to judicial review, except that the Appeals Board shall have no jurisdiction to try and determine a misdemeanor charge. The Appeals Board may refer and any worker may complain as suspected violations of criminal misdemeanor provision of this section to the Division of Labor Standards Enforcement, or directly to the Office of the Public Prosecutor."

6. On September 10, 1979, a grievance was filed with defendant employer by applicant's union business agent,

P. Alex Williams. On that date the employer's representative, Bob Batterson refused to reinstate applicant.

7. On September 20, 1979 applicant, through her union business representative, Oscar Ruiz, demanded reinstatement. This demand was made upon employer's managing representative Bob Batterson.

WHEREFORE, for all of the following reasons applicant respectfully prays that she be awarded the benefits of Labor Code §4553 to wit: The amount of compensation otherwise recoverable shall be increased one-half; that she be ordered reinstated and awarded lost wages and work benefits pursuant to Labor Code §132a; and for all such other and further relief as may be just and appropriate under the circumstances.

Respectfully submitted,
BEAUZAY, HAMMER, EZGAR,
BLEDSOE & RUCKA

By: /s/ N. Michael Rucka
N. MICHAEL RUCKA
Attorney for Applicant

Dated this 22nd day of October, 1979,
at Salinas, California, 93906

VERIFICATION AND PROOF OF SERVICE

I, the undersigned, say:

I am one of the attorneys for applicant, Angelina Avina, that the foregoing document is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of October, 1979, at Salinas, California, 93906.

/s/ N. Michael Rucka
N. MICHAEL RUCKA

I, the undersigned, say:

That I am now and at all times herein mentioned a citizen of the United States, over the age of eighteen years, a resident of Monterey County, California, and not a party of the within action or cause; that my business address is 245 W. Laurel Drive, Salinas, California, 93906, that I served a copy of the attached Petition to Reopen Pursuant to Labor Code §5803 by placing said copy in an envelope addressed to:

Littler, Mendelson, Fastiff & Tichy
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108

Dalgety Foods
P.O. Box 1491
Salinas, California 93901

which envelope was then sealed and, with postage fully prepaid thereon, was on October 22, 1979 deposited in the United States Mail at Salinas, California, 93906, that there

is delivery service by United States Mail at the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executive this 22nd day of October, 1979, at Salinas, California, 93906.

/s/ Marsha L. Kroetsch
MARSHA L. KROETSCH

EXHIBIT "A".

[Letterhead of Dalgety Foods, Inc.]

September 12, 1979

Mrs. Angelina Avina
35 Capitol Avenue
Salinas, California 93901

Dear Mrs. Avina:

Your employment with Dalgety Foods, Inc. is terminated effective September 7, 1979.

Dalgety Foods, Inc. deems it impossible to fulfill its obligation to protect you on the job and finds the burden of liability unreasonable, in view of your history of accidental injury on the job and in light of a sixty-two percent (62%) permanent disability award granted by the Workers Compensation Appeals Board. The Category of award is one based upon limitation to Semi-Sedentary work.

Dalgety Foods, Inc. does not have or offer semi-Sedentary work for which you could qualify.

Sincerely yours,

Gil Q. Lopez
Personnel Manager

cc: B. Batterson
B. Padilla
B. Shimmon
Teamsters Local 890

EXHIBIT "B".

422-2464

Date 9-6

To Whom It May Concern:

Angelina Avina

Will be unable to work/take regular P.E. from _____ to _____ because of _____ .

Is released to return to work on 9-10-79.

Limitations: No restrictions.

Other: _____ .

/s/ Stephen Storey M.D.
Drs. Hays, Storey, Englehorn, Jr. & Black, Inc.
240 San Jose Street
Salinas, CA 93901

APPENDIX C.

Petition for Referral of Suspected Criminal Violations of [California] Labor Code § 132a [by Angelina Avina] (October 22, 1979).

Before the Workers' Compensation Appeals Board of the State of California.

Angelina Avina, Applicant, vs. Dalgety Foods, Inc., Defendant. Case Nos.: 76 SAL 8071, 77 SAL 9360.

COMES NOW Applicant by her attorneys of record and petitions for referral of suspected criminal violations of Labor Code §132a of the above-captioned matters and in this connection alleges that:

1. On July 6, 1979 a Compromise and Release was entered into in the above captioned matters, which Compromise and Release was approved on July 16, 1979.

2. The Compromise and Release was intended to extinguish applicant's claim against Spiegl Foods for the injury of June 22, 1973, and to partially extinguish applicant's claim for injury occurring between March 1, 1968 and July 19, 1976. The former date being the subject matter of 76 SAL 8077 and the latter claimed period of injury the subject matter of 77 SAL 9360.

3. On September 7, 1979, Gil Q. Lopez, personnel manager of Dalgety Foods, Inc., the successor and interest to Spiegl Foods, Inc., terminated applicant from her work at Dalgety Foods.

4. On September 12, 1979, Gil Q. Lopez, personnel manager confirmed the firing of applicant by a letter addressed to applicant — a copy of which is hereinafter annexed as Exhibit "A" to the herein petition.

5. On September 6, 1979, one day prior to applicant's termination, applicant brought with her to her employer a

medical release signed by Stephen D. Storey, M.D. which released applicant to return to work on September 10, 1979 with "no restrictions". This medical release is hereinafter annexed as Exhibit "B" to herein Petition to Reopen.

This petition is authorized by virtue of Labor Code §5803 which provides continuing jurisdiction to the Appeals Board over all of its Orders, Decisions, and Awards and provides the right to review an increase in a compensation awarded. This petition is further authorized by virtue of Labor Code §132a which provides that:

> "Any employer who discharges, . . . or in any manner discriminates against any employee . . . because the employee has received a rating, award or settlement is guilty of a misdemeanor and subject to the provisions of Labor Code §4553. Any such employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.
>
> . . . Proceedings under this section for increased compensation as provided in §4553, or for reinstatement and reimbursement for lost wages and work benefits, are to be instituted by filing an appropriate petition with the Appeals Board, that such proceedings may not be commenced more than one year from the Discriminatory Act or date of termination of the employee. The Appeals Board is vested with full power, authority, and jurisdiction to try and determine all matters specified in this section subject only to judicial review, except that the Appeals Board shall have no jurisdiction to try and determine a misdemeanor charge. The Appeals Board may refer and any worker may complain as suspected violations of criminal misdemeanor provision of this section to the Division of Labor Standards Enforcement, or directly to the Office of the Public Prosecutor."

6. On September 10, 1979, a grievance was filed with defendant employer by applicant's union business agent, P. Alex Williams. On that date the employer's representative, Bob Batterson, refused to reinstate applicant.

7. On September 20, 1979 applicant, through her union business representative, Oscar Ruiz, demanded reinstatement. This demand was made upon employer's managing representative Bob Batterson.

WHEREFORE, it is respectfully prayed that applicant be awarded the benefits and protections of Labor Code §132a and more particularly that this matter be referred to the Division of Labor Standards and Enforcement for prosecution under the criminal misdemeanor provisions of Labor Code §132a; and for all such other and further relief as may be just and appropriate.

Respectfully submitted,
BEAUZAY, HAMMER, EZGAR,
BLEDSOE & RUCKA
By: /s/ N. Michael Rucka
N. MICHAEL RUCKA
Attorney for Applicant

Dated this 22nd day of October, 1979,
at Salinas, California, 93906

VERIFICATION AND PROOF OF SERVICE

I, the undersigned, say:

I am one of the attorneys for applicant, Angelina Avina, that the foregoing document is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of October, 1979, at Salinas, California, 93906.

/s/ N. Michael Rucka
N. MICHAEL RUCKA

I, the undersigned, say:

That I am now and at all times herein mentioned a citizen of the United States, over the age of eighteen years, a resident of Monterey County, California, and not a party of the within action or cause; that my business address is 245 W. Laurel Drive, Salinas, California, 93906, that I served a copy of the attached Petition for Referral of Suspected Criminal Violation of Labor Code §132a by placing said copy in an envelope addressed to:

Littler, Mendelson, Fastiff & Tichy
A Professional Corporation
650 California Street, 20th Floor
San Francisco, California 94108

Dalgety Foods
P.O. Box 1491
Salinas, California 93901

which envelope was then sealed and, with postage fully prepaid thereon, was on October 22, 1979 deposited in the United States Mail at Salinas, California, 93906, that there

is delivery service by United States Mail at the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of October, 1979, at Salinas, California, 93906.

/s/ Marsha L. Kroetsch
MARSHA L. KROETSCH

EXHIBIT "A".

[Letterhead of Dalgety Foods, Inc.]

September 12, 1979

Mrs. Angelina Avina
35 Capitol Avenue
Salinas, California 93901

Dear Mrs. Avina:

Your employment with Dalgety Foods, Inc. is terminated effective September 7, 1979.

Dalgety Foods, Inc. deems it impossible to fulfill its obligation to protect you on the job and finds the burden of liability unreasonable, in view of your history of accidental injury on the job and in light of a sixty-two percent (62%) permanent disability award granted by the Workers Compensation Appeals Board. The Category of award is one based upon limitation to Semi-Sedentary work.

Dalgety Foods, Inc. does not have or offer semi-Sedentary work for which you could qualify.

Sincerely yours,

Gil Q. Lopez
Personnel Manager

cc: B. Batterson
B. Padilla
B. Shimmon
Teamsters Local 890

EXHIBIT "B".

422-2464

Date 9-6

To Whom It May Concern:

Angelina Avina

Will be unable to work/take regular P.E. from _____ to _____ because of _____ .

Is released to return to work on 9-10-79.

Limitations: No restrictions.

Other: _____ .

/s/ Stephen Storey M.D.
Drs. Hays, Storey, Englehorn, Jr. & Black, Inc.
240 San Jose Street
Salinas, CA 93901

APPENDIX D.

Partial Transcript of Arbitration Hearing (October 26, 1979).

County of Monterey, State of California.

Arbitrator: Ralph F. Duncan.

Dalgety Foods, Inc., Employer, and Teamsters Local 890, Union. Involving the Discharge of ANGELINA AVINA.

ARBITRATION

Taken before Dennis Tessler, a Notary Public, In and for the County of Santa Clara, State of California

October 26, 1979

Appearances:

For the Employer:

Messrs. Littler, Mendelson, Fastiff & Tichy
by GEORGE J. TICHY, II, Esq.

For the Union:

Messrs. Beauzay, Hammer, Ezgar, Bledsoe & Rucka
by MELVYN D. SILVER, Esq.

FRIDAY, OCTOBER 26, 1979, 10:00 A.M.
ARBITRATION

The Arbitration came on to be heard on Friday, the 26th day of October, 1979, at the hour of 10:00 o'clock a.m.

The Employer being represented by Messrs. Littler, Mendelson, Fastiff, & Tichy, by GEORGE J. TICHY, II, Esq., and the Union being represented by Messrs. Beauzay, Hammer, Ezgar, Bledsoe & Rucka, by MELVIN D. SILVER, Esq., the following proceedings were had at the Laurel Inn on West Laurel Drive, in the City of Salinas, California,

County of Monterey.

THE ARBITRATOR: So you can note, this meeting commenced at eight minutes after 10:00. Are you proceeding first, Mr. Tichy?

MR. TICHY: Yes. This is a discharge case and I'd like to make a brief opening statement if I could. Angelina Avina is an employee of several years at Dalgety Foods, and that several years in terms of number of years that she has been listed as an employee, but she has really only worked for a few years, and the reason is that she had serious injuries. What happened was that Angelina Avina in 1973 had an ankle injury — excuse me, a wrist injury. Additionally, she had a reinjury of some sort an din 1979 had her knee replaced. In March of 1979 she returned to work and for a period of approximately two months worked at the plant and then suffered a back injury which resulted in her leaving work at that particular time. After a period of approximately two or three weeks we were advised that she had received a Workers' Compensation Disability Award, and as a result of that particular advice we checked into her particular physical condition and evaluated that in terms of how that related to her ability to perform work. After examining various doctor's reports and also checking to ascertain the nature of the duties which are involved in her particular job, it became apparent to us that she was no longer capable of performing the job that she had at Dalgety Foods. It then became incumbent upon us to take the necessary action to discharge her. Now, it is the position of Dalgety Foods that the issue in this case is whether or not Miss — or Ms. Avina is discharged for cause within the means of the Collective Bargaining Agreement.

It is our position that she was in fact discharged for cause based upon the fact that she, because of her physical con-

dition, had a serious risk of injury to herself, and continued employment at Dalgety Foods also created a serious risk of injury to others around her. It is additionally our position that because of the inherent problems associated with her condition that it was very unlikely that she would be able to perform her work adequately. In fact, our investigation has disclosed that she was during that roughly two months of time that she worked for the company performing jobs which were of a lesser nature than those which are normally required by her job category position, and that as a result of her being placed in those particular positions — which were merely a matter of circumstances — that there were numerous situations in which she was complaining about her physical problems and, additionally, that she worked extremely slow and was one of the slowest people on the particular operation. So, it is our position that, based on that issue, that the discharge should be sustained.

THE ARBITRATOR: Before we have any response I'd like to determine one thing: Do you agree with Mr. Tichy that's the appropriate question before me?

MR. SILVER: No, we are here on two totally different issues.

THE ARBITRATOR: Well, let's get that straightened out if we can.

MR. SILVER: Angelina was terminated on the basis of the Company's position, and I'll quote it exactly, "Dalgety Foods deems it impossible to fulfill its obligation to protect you on the job and finds the burden of liability unreasonable in view of your history of accidental injury on the job". The fact is she returned to work with a complete release from her doctor saying no restrictions to her whatsoever. Therefore, the inquiry, if the Company disagreed with Dr. Storey's complete and unequivocal medical release, the bur-

den would be on the Company to have Mrs. Avina examined at their own expense to see if there is a difference of medical opinion. But, in light of the medical opinion that she could unequivocally return to work, then the Company cannot take it upon themselves to determine otherwise that she's not qualified.

Further, it is our position that the Company never even offered her an opportunity to return to work to evaluate her ability on the job, but in fact, fired her on the basis that having had some injuries in the past she was more likely to have them in the future, and that is not a proper basis of termination. Consequently, we hold simply medically she was fit, and she reported to the Company and thereafter, the Company terminated her.

THE ARBITRATOR: One thing I want to get straight here, if I can, is whether I'm making a decision based on whether or not there is a violation of the Collective Bargaining Agreement occurred?

MR. SILVER: As I understand the contract, she was being terminated only for just cause. It is our position that the termination, as it occurred, was not for just cause. If the Company has any other basis of termination that is not brought out as the actual reason, and this is not the proper place to bring it up. They are bound to the actual reason at the time of termination.

MR. TICHY: Let me start out by making as Joint Exhibit 1 the Collective Bargaining Agreement.

(Whereupon Collective Bargaining Agreement effective July 1, 1976 through June 30, 1979 received into Evidence as Joint Exhibit No. 1.)

MR. TICHY: Then, I would suggest that the issue be framed in terms of the language of the Collective Bargaining Agreement, and if you will give me the Agreement, I'll

show you the particular section that's involved. It's actually Page 18 of the Agreement. It's Section 13, Section L and Sub-Section 1, which provides for discharge for cause. The terminology in this agreement is not "discharge for just cause," it's "discharge for cause" and we would submit that the issue would be whether or not Angelina Avina was discharged for cause within the meaning of the Collective Bargaining Agreement. Is that agreeable?

MR. SILVER: State that again.

MR. TICHY: Whether or not Angelina Avina was discharged for cause within the meaning of the Collective Bargaining Agreement.

MR. SILVER: Well, I'll agree to the extent that that actually quotes the language of the agreement.

MR. TICHY: Well, in order to proceed we have to have an agreement that this is in issue that there is an issue which is being submitted to the Arbitrator, and I would submit that the language of that issue should be whether or not the grievant, in this case Angelina Avina, was discharged for cause within the meaning of the Collective Bargaining Agreement.

MR. SILVER: We will agree to that.

MR. TICHY: Thank you. I've given my introductory statement. I would like to suggest that we enter into some stipula- . . .

APPENDIX E.

Brief on Behalf of the Union [in arbitration] (December 12, 1979).

County of Monterey, State of California.

Arbitrator: Ralph F. Duncan.

Dalgety Foods, Inc., Employer, and Teamsters Local 890, Union. Involving the Discharge of ANGELINA AVINA.

BRIEF STATEMENT OF FACTS

ANGELINA AVINA was originally employed by the predecessor of Dalgety Foods in 1968, and continued to work at Dalgety Foods up to and including July 9, 1979. On July 10, 1979, Mrs. Avina was injured as a result of a fall on a parking lot at a local supermarket and unable to report back to work until September 7, 1979. At that time she was terminated, by letter dated September 12, 1979, joint Exhibit Two.

Two reasons for the termination are stated in the second full paragraph of that letter, quoted herein:

"Dalgety Foods, Inc. deems it impossible to fulfill its obligation to protect you on the job and finds the burden of liability unreasonable, in view of your history of accidental injury on the job and in light of a sixty-two percent (62%) permanent disability award granted by the Workers' Compensation Appeals Board. The category of award is one based upon limitation to Semi-Sedentary work."

The contract between the parties, joint Exhibit One, requires that any discharge of an employee be "for cause", page 18, section, 13 (1). Further, section 2 (a), at page 3, provides that the company shall not discriminate based on handicap.

The Union filed this grievance on behalf of Mrs. Avina claiming that she was not discharged for cause, but that her discharge was without cause and in violation of the discrimination provisions of the contract as well. This arbitration ensued.

ARGUMENT

The company position as viewed by the Union appears to be as follows:

1. Angelina Avina suffered a series of injuries over the past 11 years, some of which have fully healed (a 1975 cut finger, a 1977 cut on her inner arm), some that have left her with some degree of residual limitation (knee injury in 1978, wrist fracture in 1973, and back injury in 1979). Indeed, the back injury revealed a congenital back problem which Mrs. Avina has always had and always will have. (R120: 10-15). She is not currently experiencing any back problems (R 15:22-23).

As a result of her knee injury, she received a $22,000 award by way of Compromise and Release through the Workers' Compensation system. It was the size of the award that caused Mr. Brian Muth, Corporate Safety Manager, to investigate this matter (R137:19-26) Mr. Muth in turn made a recommendation to R.L. Batterson, Director of Industrial Relations, that Mrs. Avina be discharged (R172:24-25). Mr. Batterson was delighted to accept the recommendation of Mr. Muth, revealing the true reasons behind the discharge of Angelina Avina. Mr. Batterson has unequivocably stated "We can't be put in a position of having to recompensate for reoccurring liability." (R174:20-21). Certain employees present higher risk of injuries than other employees (R175:22-25). If that employee becomes re-injured and gets certain benefits, this increases the cost of doing business. (R176:7-10). In spite of a complete medical release by Dr. Stephen

Story permitting Angelina Avina to return to work, Batterson was concerned that because of prior injuries, she was more prone to re-injury and that it could happen at any time, six months, a year, or tomorrow (R177:20-24). Even though Mrs. Avina's work was satisfactory during her last period of employment and her injury was non-work related, Batterson was concerned that the company would incur liability at some indefinite time in the future but would definitely incur liability if they returned her to work (R178:14-26, 179:1-6). The direct testimony of Mr. Batterson in his own words sums it all up:

"By Mr. Silver: Q. When the decision was reached to terminate Angelina, you did not know whether her condition, which you felt would be aggravated by her continued work, would be aggravated in another week or ten years?

A. That would be impossible for me to say. It could be tomorrow. That's obviously why we made the decision.

Q. As a precautionary measure you decided not to rehire her? You thought you were saving her from her?

A. Yes, exactly, and saving other employees.

Q. And lower the liability risk to the company at the same time?

A. Ultimately that is what it would result in, yes" (R page 179:24-26, 180:1-8)

Thus, the real lesson of the matter is that the company was afraid that continued employment of a person who had some disability meant that that person was more likely to incur an aggravation of that preexisting injury at some time in the future than a person who did not. That person then posed a higher risk of placing a workers' compensation claim against the company, and incurring costs against the company than a person who had no disability. The fact that the disability did not prevent the person from performing

the duties of the job was not relevant, only the future risk was relevant. This of course, is in clear violation of Section 2 of the agreement as well as of Section 13.

2. The company then attempted to justify its actions on the nebulous basis of medical information showing that Angelina Avina was incapable of performing the duties of the job. While R.L. Batterson simply ignored Dr. Story's clearance, counsel for the attorney did bring Dr. Story to testify. Brian Muth said that he based his decision on the medical records (R149:11-14), on all of her prior injuries (R148:20-26) and on the conversations with Dr. Story. So concerned was Mr. Muth about the safety of Angelina Avina that he even presumed that she had fallen during her prior period of employment, even though he admitted that he had absolutely no knowledge of any falling from March of 1979 to the accident of July 10, 1979, which was off company premises (R:162 13-22).

Finally, Gil Lopez testified that when a person applys for a job his only concern is a physical examination to determine if a person is currently capable of performing the job (R52:6-13). However, he seems to be under specific instructions to discriminate against those having a disability, where if a person has a medical history which does not affect their present ability to do the job, but might in the future, speculatively, he will reject her (R54:18-26, 55: 1-11). However, Mr. Lopez testified that he specifically based his decision not to rehire Angelina Avina based on Dr. Story's opinion (R63:3-8), but this opinion, relied upon according to Lopez's testimony by Lopez, Muth and Batterson, was to accept Dr. Story's earlier opinion rather than his later one (R67:9-13). Obviously, a review of those medical reports show that if one wishes to find disability, the earlier medical report was the one on which to base such conclusion. Of course, Dr. Story testified that he gave the earlier

opinion based upon company Exhibit Four, the detailed analysis made by Ken Cordrey (R122:19-26). However, after Dr. Story viewed the company films (R122:8-11) and had reviewed the job requirements, Company Four, he concluded as follows:

"Q. Based on the fact that she worked full time between February and July 1979 by her desire to return to work, and your current knowledge of her work that the film shows, do you believe she is physically able to go in and do that work as earlier?

A. I think she is physically capable of doing that, yes." (128:5-10). Dr. Story is aware that the prior disabilities are ones that could become serious problems in the future. But as the doctor again stated, he has no idea as he said that day at the arbitration whether that will occur in six months or ten years (R128:15-17). The doctor reinterated more than once that she could do the job (R129:11-17, 23-26, 132:3-9, 15-23).

Basically, all that Dr. Story said was that she is physically capable of returning to work now. At some time in the future, some *undetermined* time, she may begin experienceing symptoms which may ultimately require that she terminate work. The doctor has no idea whether those symptoms will occur in six months or ten years. Anyone, including Angelina Avina, who has suffered a prior injury is more prone to have a reoccurrence of that particular injury at some indeterminate time in the future.

Angelina Avina herself testified that insofar as the job as shown in the film and from her experience, she would currently accept employment and felt that she could do all parts of the job (R189:9-16).

3. The Union's position is really a very simple one. Dr. Story gave her clearance to return to work on September 7,

1979. She presented herself for work. The company determined that she presented a future risk of filing a workers' compensation claim and therefore terminated her. No effort was made to check with Dr. Story as to her present physical condition or the basis as to why his clearance apparently contradicted his earlier August 1979, opinion. Of course, it is evident that his August 1979, opinion was based upon a time and motion study which presented a very different view of her working conditions than the actual films which he observed later. Having observed the films, *the actual employment situation*, he released her for work. What more can Angelina Avina do?

It appears that Angelina Avina was not the fastest worker in her department, nor the slowest. Two floor ladies so testified. There were no records of any complaints in her record concerning her physical inability to do her job (R156:2-6). And, the company has not raised the issue that she was an inefficient worker, an incompetent worker, that it was eliminating all of the slow employees, or that she failed to perform to or exceed the minimum requirements of her job. The company basis its sole position on the fact that she has a possibility of becoming involved in a future workers' compensation claim by being somewhat more prone to injury in certain areas of her body due to her prior history of injury, than possibly other workers. This, in the Union's opinion, is not cause, just or otherwise, indeed, no cause at all, for termination. It is rather discrimination. In both instances Section 13 and Section 2 of the contract are violated.

SUMMARY

The Union's position is that Angelina Avina was cleared by her doctor to return to work on September 7, 1979, and in accordance with the contract presented herself for em-

ployment. The company declined to employ her. The reasons behind the company's decision was that she raised a potential of a future workers' compensation claimant. That is not cause under the contract for termination.

REMEDY SOUGHT

Angelina Avina should be reinstated with full pay and benefits, and all attendant rights of seniority thereto, effective as of her return to employment date of September 7, 1979, and all notices of termination or discharge be removed from her records.

DATED: Dec. 12, 1979.

Respectfully submitted,

/s/ Melvyn D. Silver

MELVYN D. SILVER

I, the undersigned, say:

That I am now and at all times herein mentioned a citizen of the United States, over the age of eighteen years, a resident of Santa Clara County, California, and not a party to the within action or cause; that my business address is 300 West Hedding Street, San Jose, California; that I served a copy of the attached BRIEF ON BEHALF OF THE UNION by placing said copy in an envelope addressed to

Mr. Ralph F. Duncan
Arbitrator
233 North Trout Lake Avenue
Sanger, CA 93657

which envelope was then sealed and, with postage fully prepaid thereon, was on _____ deposited in the United States mail at San Jose, California; that there is delivery service by United States mail at the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 11, 1979, at San Jose, California.

/s/ Jacqueline S. Von Voonhis
Jacqueline S. Von Voonhis

APPENDIX F.

Post-Hearing Brief of Employer [in arbitration] (December 26, 1979).

In Arbitration Proceedings Pursuant to the Provisions of the Current Collective Bargaining Agreement between the Parties before Ralph F. Duncan, Impartial Arbitrator.

In the Matter of a Controversy between Dalgety Foods, Inc., Employer, and General Teamsters, Packers, Food Processors and Warehousemen, Local 890, Union, Involving the Discharge of Angelina Avina.

Dated: December 26, 1979.

I

INTRODUCTION

This proceeding involves the discharge of Angelina Avina (hereinafter "Grievant"), a general production worker, by Dalgety Foods, Inc. (hereinafter "Company") on September 12, 1979. The discharge is properly disputed before the Arbitrator pursuant to a request for arbitration made by Local 890 of the General Teamsters, Packers, Food Processors and Warehousemen (hereinafter "Union") under the collective bargaining agreement between the parties. *See* Joint Exhibit No. 1.

The parties have requested the Arbitrator to determine whether the Grievant was discharged for cause within the meaning of the collective bargaining agreement. The evidence submitted by the parties establishes that the Company reasonably found, after careful review of the Grievant's medical history, that continuing to employ the Grievant would present an unduly high risk of injury to her fellow workers as well as to herself. The discharge, therefore, was for cause.

II
ISSUE

The sole agreed issue properly before the Arbitrator is whether the Company discharged Angelina Avina for cause within the meaning of Section 13(L)(1) of the collective bargaining agreement.

III
STATEMENT OF FACTS

The Company hired Angelina Avina as a general production worker in 1978 (Tr. 69). On September 12, 1979, the Company was forced to terminate her.

This termination did not come easily to Dalgety Foods, Inc. Dalgety is a company that prides itself on the fairness and consideration with which it treats its employees. The Company realizes that no job means no paycheck and that, as a result, an employer has a responsibility to its employees to discharge them only under appropriate circumstances. Dalgety takes that responsibility very seriously. So seriously, in fact, that in the last seven years the Union has found it unnecessary to bring *even one* arbitration over an employee's discharge (Tr. 172). But coupled with the Company's concern for individual employees is a far greater concern for the employees as a group. The Company not only complies with various OSHA regulations (Tr. 61), but attempts to eliminate hazards in the workplace. In this regard, the Company follows an ironclad policy of not allowing a person to work if it appears that there would be an undue risk of serious bodily injury to that person or his fellow workers (Tr. 50-51, 77-78).

The Company became aware that, due to an apparently substantial physical disabilty, Avina might present just such an unacceptable risk (Tr. 167). Even then, however, termination did not come automatically. It was only after nearly

two months of careful investigation and deliberation that the Company decided it had no choice but to discharge the Grievant. There was simply too great a chance that her physical disability could create a situation in which her fellow workers, as well as herself, would be seriously injured.

Three people from three different strata of the Company's management were involved in the decision. Gilbert Q. Lopez, the plant Personnel Manager (Tr. 19) knew Avina's job backwards and forwards. Before becoming Personnel Manager he had been a line foreman at the Salinas plant (Tr. 29-30). He thoroughly knew what was involved in each job that Avina had to perform, and he knew how tough the jobs were. Brian Muth, as Corporate Safety Manager (Tr. 137), knew the safety risks as thoroughly as Mr. Lopez knew Avina's job. Robert L. Batterson, the Company's Director of Industrial Relations for the past seven years (Tr. 172), weighed the probable harm to Avina from discharge against the probable harm to the Company and Avina's fellow workers, as well as to herself, from allowing her to continue to work.

Mr. Lopez discussed the situation with Mr. Muth and Mr. Batterson (Tr. 66-67), but his role was limited to supplying details about what Avina's job involved (Tr. 80-81). Mr. Muth collected the relevant information: what Avina's job entailed, what her medical history revealed about her physical disability, and what the safety risks were. After his investigation, Mr. Muth concluded that the risks were too great, and recommended that Mr. Batterson discharge the Grievant (Tr. 172). Mr. Batterson reviewed all the evidence and determined that continuing to employ the Grievant would create an unacceptably high risk of injury to the Company, her fellow workers and herself. Moreover, the Company had interests independent of its employees. Were an accident to occur as a result of Avina's continued em-

ployment, the Company might well be liable for a Workers' Compensation Award to the injured employee, or perhaps even liable on a tort theory to the injured employee for its negligent failure to terminate the employment of a person whose physical disability created a risk of harm to her fellow workers (Tr. 144-145). Alternatively, were Avina's physical disability to result in a mishap, the food product could easily be contaminated as a result (Tr. 31, 47). Accordingly, Mr. Batterson made the final decision to discharge the Grievant (Tr. 173-174).[1]

Extensive evidence was presented at the hearing concerning the investigation, and the facts collected in it which formed the basis for that decision. The possibility that continuing to employ Avina would run afoul of the Company's obligation to protect its employees from harm on the job first came to the Company's attention in mid-July, 1979. At that time, Mr. Muth learned of a Workers' Compensation Compromise and Release (hereinafter "C & R") which awarded Avina $22,628.80 (Tr. 137). *See* Company Exhibit No. 1. It was an unusually large award, Mr. Muth thought, and suggested a very substantial physical disability. Mindful of the Company policy of not assigning work to a person where risk to herself or others seemed unduly high (Tr. 50-51, 77-78), Mr. Muth began investigating the extent of Avina's physical disability.

The investigation proceeded on several fronts. First, Mr. Muth sought to ascertain the significance of the C & R award in terms of the physical disability it represented. Mr. Muth checked the standard Workers' Compensation "Table of Permanent Disability Indemnity" and discovered that $22,628.80, the dollar amount of the C & R award, equated

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[1]The letter of termination itself, of course, was sent under the signature of the Personnel Manager, Mr. Lopez. *See* Jt. Exhibit No. 2.

with a 62% disability rating (Tr. 140-141). Leery of relying on a single opinion, Mr. Robert L. Batterson, the Company's Director of Industrial Relations (Tr. 172), asked Mr. Muth to double-check his finding with the Company's Workers' Compensation Insurance Carrier (hereinafter "Compensation Carrier") (Tr. 181).

Mr. Muth then obtained the independent opinion of the Company's Compensation Carrier as to the extent of disability represented by the C & R award. His own opinion was confirmed (Tr. 139). However, Mr. Muth realized that the rating alone did not answer his questions.

The Company carefully eschewed a policy of discharging employees simply on the basis that they had received a disability rating of some figure (Tr. 81, 149, 150). As Mr. Batterson explained, this is because a particular disability rating alone is inadequate to inform the Company of whether an employee is too disabled to allow him or her to continue to work (Tr. 173-174). That would of course depend instead on the particular circumstances of the case including, for example, comparing which specific physical functions were impaired with which functions are necessary to the job so as to insure efficient production, the safety of the employees, and the purity of the product.[2]

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[2]At the hearing there was some confusion about how important the rating was thought to be by Gilbert Q. Lopez, the Personnel Manager. Although he was unaware of whether the Company actually followed any specific policy with regard to disability ratings (Tr. 88), his opinion was that the disability rating *should* be enough to justify discharge (Tr. 83-84). Perhaps this is explained by his belief that Avina's 62% disability rating meant simply that she had lost 62% of her ability to do her job (Tr. 82). Mr. Lopez explained that there are no jobs at the Company for a person who is that disabled; an employee must "be a hundred percent able to do that job" (Tr. 87). In any event, this is of only peripheral significance since it was Mr. Batterson, not Mr. Lopez, who considered all the evidence and made the decision to discharge Avina (Tr. 173-174).

After the Compensation Carrier confirmed that the C & R award represented a disability rating of 62%, Mr. Muth sought more detail about the extent of physical "impairment" Avina suffered, including her medical background (Tr. 138).[3] To convert Avina's disability rating into specific restrictions on particular movements, Mr. Muth then consulted the standard Workers' Compensation "Rating Plateau Guidelines For Work Capacity" (Tr. 142). *See* Company Exhibit No. 5. Under those Guidelines he learned that she fell into Category G, which meant she had lost over 50% of her ability to push or pull or perform similar tasks, and she was able to work only if half of the time were sitting, and half standing (Tr. 142). *See* Company Exhibit No. 5.

Mr. Muth also obtained extensive reports of various doctors which detailed Angelina Avina's medical history and her physical limitations (Tr. 142). One thing that came to light was that Avina had suffered an unusual series of injuries during the last seven years which required substantial time off for treatment and recuperation (Tr. 12-15). For the most part, these injuries were restricted to falls injurying her right hand and wrist, her right knee and her back.

Avina's accidents began in 1972, when she fractured her right thumb (Tr. 12). On June 21, 1973 she fell at work, fracturing her right wrist and left fifth finger (Tr. 12). The fracture of her right wrist was severe enough to require that it be encased in a cast (Tr. 12). Less than three months later, while at home on September 17, 1973, Avina fell again and reinjured that same wrist (Tr. 13).

Avina eventually returned to work after these injuries, but her accidents returned with her. On some uncertain date,

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[3]The Company follows a policy of reviewing the medical records of an employee if a potential problem with safety comes to light (Tr. 158-159).

probably December 10, 1975, she lacerated her right index finger with a knife (Tr. 13). Some months later, on July 19, 1976, she slipped again at work on her way to the lavatory. The resultant twist to her right knee was so severe that ultimately it was followed by a total knee replacement (Tr. 13). Avina sustained another knife cut on July 28, 1977, this time to her right inner arm (Tr. 15).

In late 1978 or early 1979, Avina's right knee was totally replaced in surgery (Tr. 11). Shortly thereafter, in early July, 1979, she fell yet another time, seriously injuring her low back (Tr. 15).

Included among the doctor's reports which came to his attention, Mr. Muth found a detailed and very recent letter from Dr. H. Phillip Dohn (Tr. 142). This letter, dated March 5, 1979, not only confirmed Mr. Muth's conclusion that Avina had been rated in Category G of the Rating Plateau Guidelines for Work Capacity, but that there were serious physical limitations which he had to consider with regard to her ability to safely continue work at Dalgety. The doctor himself declared: "Objectively I would place the patient under the Category 'G'." Company Exhibit No. 3, at 4 (Tr. 142-143). Dr. Dohn went into more detail about Avina's physical disabilities:

> "When questioned, the patient states she has definite difficulty in the use of the right wrist and hand, complaining of awkwardness on fine motions and a definite and major loss of strength and grasp.
>
> "The patient also states that she has some persistent low grade discomfort in the right knee which at times becomes rather definitely painful if she walks a lot. She states if she walks on uneven ground she will have a definite aggravation. The patient states the pain will radiate up into the mid-thigh and will radiate down into the mid-calf region." Company Exhibit No. 3 at 1-2.

Dr. Dohn measured the range of knee motions, and discovered that Avina's right knee could flex only over 85%, while her left knee could flex over 135%. Moreover, "[t]he patient shows definite evidence of 7 or 8% of a medical lateral instability in the right knee." Company Exhibit No. 3 at 2. The Doctor continued, stating that "[s]tudies of the right knee show definite evidence of markedly advanced degenerative arthritic changes of the joint." Company Exhibit No. 3 at 3.

Dr. Dohn's examination showed that Avina's right wrist, as well, was seriously impaired:

> "Evaluation of the right wrist shows definite evidence of a moderate Silver fork deformity of the wrist. The patient at rest holds the wrist in the radial deviated position by about 15% on the right." Company Exhibit No. 3 at 2.

Furthermore, Avina's right wrist had an extension of only 65 degrees as compared to 7 degrees for the left, and a flexion of only 45 degrees as compared to 75 degrees for the left. The left wrist could describe an Ulnar deviation of 30 degrees, but the right could describe only trace Ulnar deviation. Similarly, the grasp in her right hand was markedly inferior to that in her left:

> "Grasp with two Jamar type dynamometers used simultaneously produces the following readings:
>
> | | | | | |
> |---|---|---|---|---|
> | Right: | 5 | 5 | 3 | kgm |
> | Left: | 14 | 12 | 10 | kgm" |
>
> Company Exhibit No. 3 at 3.

All told, Mr. Muth examined at least five doctor's reports (Tr. 143). He also learned, from a report by Dr. Stephen D. Storey on Avina's condition after her most recent fall in July of 1979, that she had a "low back deformity" (Tr. 143). Mr. Muth "took particular note of that (Tr. 143-144), and on August 8, 1979, the Company, by Mrs. Bess Shim-

mon, the Company nurse, contacted Dr. Storey to investigate Avina's ability to do particular aspects of her job as briefly described in Mrs. Shimmon's letter. Company Exhibit No. 2-B. Dr. Storey promptly replied that "reaching at arm's length across a waist-high conveyor belt would not only be dangerous for her, but possibly impossible for her." The doctor added, "cold environments would probably aggravate her problem so she should probably not work in a cold and drafty environment." Company Exhibit No. 2-A.

The actual job, of course, was substantially more difficult and strenuous than a brief description could convey. Thus, as Mr. Batterson explained, the Company gave "very very little weight" to a subsequent printed form from Dr. Storey's office, dated September 6, 1979, that released Avina for work with "no restrictions" (Tr. 177). Whereas Dr. Storey could rely only on the brief job description in Mrs. Shimmon's letter and the representations of the Grievant herself as to the difficulty or requirements of Avina's job, the Company could call on the knowledge of Mr. Lopez and actually observe the production line.

At the hearing, the Company conclusively established that Mr. Lopez' superior familiarity with Avina's job and hazards in the plant were indispensable in making a reasonable decision about whether the Grievant should be allowed to continue to work in the plant. At the hearing, the Company attempted to show the Arbitrator exactly what was involved in Avina's job through a film of certain portions of the production line and Motion Analysis Descriptions of most job functions, both prepared by the Company's Industrial Engineer, Kenneth 1. Cordrey.[4] Moreover, the Company

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[4]Avina was a general worker who was expected to, and at some point did, work in every department in production (Tr. 23). The Company counted on its employees to be available "to perform all jobs in the labor category they are in" (Tr. 148).

introduced evidence that, when performing similar jobs, Avina had worked poorly and with constant complaint.

The film showed six distinct operations at Dalgety: lima bean sorting, brussels sprouts sorting, brussels sprouts check weighing, carrot dicing and topping, broccoli preparation, and broccoli packing. Mr. Cordrey, who took the film and is personally familiar with the production line operations (Tr. 29), testified that it accurately depicted the operations of Dalgety's production lines (Tr. 28, 29). Mr. Lopez, also familiar with the production line operations (Tr. 30), described the physical motions involved in each of the jobs shown on the film.

During lima bean sorting, the employees face a constant flow of material in sets of two hours between breaks (Tr. 32). During this time, the employees constantly move their hands back and forth and sideways. Their wrists are under particular strain as they must be moved up and down as well as back and forth while sorting (Tr. 31). During sorting, the employees are responsible for picking up defective beans or impurities with their fingers and disposing of them. This operation requires a great deal of mobility in the fingers and flexibility in the wrists (Tr. 32).

The sorting of brussels sprouts involves somewhat the same motions. The employees' hands, wrists, and fingers must constantly dart and twist to pick out the defects on the line (Tr. 34). The employees must, in addition, periodically empty the tray in which they throw the defective product — a tray which weighs "up to fifteen, twenty-five, thirty pounds" (Tr. 33) In check weighing, where the employees make sure that each box of finished product weighs the correct amount, the employees must constantly add to or take from the boxes that pass before them on the line (Tr. 34-35). Here, too, hand motions are constant, and the employees must repeatedly lift boxes of product weighing up

to forty ounces (Tr. 35, 36). In adjusting weights, moreover, employees must "turn around, turn and twist," in a twisting motion which is "very difficult" (Tr. 35-36). The employees work constantly in sets of two hours between breaks (Tr. 36).

In the carrot topping operation, the employee stands at a moving belt and places carrots into small pockets on another moving belt from where they go into a saw which slices off the tops of the carrots (Tr. 37-38). Because the carrots come toward the employee all jumbled up, the employee's hands must constantly be reaching, twisting and turning to sort the carrots out in orderly rows for them to go into the saw (Tr. 38-39). At the broccoli preparation station, the employees cut the butts off the broccoli and quarter the heads into smaller pieces (Tr. 40). In order to perform this operation properly, the employees constantly rock back and forth as they work (Tr. 40-41). As each employee cuts the broccoli in different directions, he must make up and down as well as sideways motions with her sharp knife (Tr. 41). Occasionally an employee will encounter a broccoli head that is very fibrous, or "wooden-type," and significantly more strength must be employed to cut off the stem (Tr. 41). This operation, too, is a continuous process of "quartering the broccoli heads, cutting the stem off, cutting the leaf off . . . reaching over and picking up the broccoli and putting it on the tray," while the employee holds broccoli in one hand and his knife in the other (Tr. 42). The employees are expected to work fairly quickly (Tr. 42). In broccoli packing, where the employee will pack the cooked broccoli into boxes, each employee must constantly be twisting his wrists as he takes broccoli from a moving jumbled pile and aligns the spears in a common direction so that they will fit into the box (Tr. 43). Each employee must constantly lean over a waist high belt and be able to reach

completely across the belt to do his job properly (Tr. 43-44).

The difficult, constant and repetitive movements involved in the various operations on the production line were further detailed through the testimony of Kenneth L. Cordrey, the Company's industrial engineer (Tr. 92). Mr. Cordrey, an expert at analyzing the motions involved in job functions (Tr. 92), prepared analyses of the motions involved in Avina's job functions in particular (Tr. 92-93). *See* Company Exhibit No. 4. To prepare the Motion Analysis Descriptions, Mr. Cordrey studied the operations for which Avina would be responsible (Tr. 93) and identified the particular motions through which the employee would have to go in order to perform the job (Tr. 94). He then separately counted the number of distinct motions, e.g., wrist motions and grasps (Tr. 96), reaches (Tr. 96-97), and twists (Tr. 97-98), and extrapolated from the number of such motions performed in the unit of time studied to the minimum (Tr. 99) number of motions required in an eight-hour shift (Tr. 94). For the most part, the difficulty of each operation was reflected in the numerical descriptions of the motions involved. For the broccoli preparation operation, for example, each employee would move his right hand[5] in a minimum of 74,970 wrist motions, 4,410 grasps, and 70,560 reaches. He would also move his torso in a minimum of 8,820 leans and 8,810 twists Company Exhibit No. 4. In some operations, however, complicating factors make the job much more difficult than the numbers alone convey. For example, Mr. Cordrey explained on cross-examination that superior manual dexterity is necessary where there "would be some-

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[5]Mr. Cordrey counted only the right-hand motions for this study (Tr. 100) since "the left hand is usually a support operation." (Tr. 104). If the left hand were included as well, of course, the total number of hand motions would be much higher.

thing very small and difficult to pick up from a conveyer" (Tr. 102). Grasping is expecially difficult in the lima beans post-blanche sorting operation and the diced carrots saw operation (Tr. 102).

Mr. Cordrey noted that he had not studied Avina specifically (Tr. 100-101, 103). To fill out the picture, therefore, the Company introduced the testimony of two employees who had worked closely with Avina during her last tour of duty before her discharge. Ruby Mae Bandura, who has been a floor person for ten or twelve years at Dalgety, worked with Avina on the asparagus packing operations during April, May and June of 1979 (Tr. 105-106). Mrs. Bandura testified that Avina was an extremely slow worker (Tr. 106). Perhaps the best indicator of precisely how slow is that her fellow workers, who complain when somebody is not working fast, complained more about Avina's speed than about other employees (Tr. 107-108). Avina was so slow, in fact, that Mrs. Bandura was forced to report to her foreman that she was not producing at the Company's minimum standard (Tr. 109). Avina's slowness was especially remarkable because the newer workers were usually slower, not old hands like Avina (Tr. 110).

A similar situation was described by Sophie Arias, another floor person who had worked with Avina on asparagus sorting from late March through mid-June of 1979 (Tr. 111). Avina may not have been the very slowest (Tr. 113), but she was so slow that Mrs. Arias was forced to put her on easy jobs where speed was not essential (Tr. 112). Unfortunately, Mrs. Arias was completely unable to use Avina on some jobs, for example check weighing, because she was too slow (Tr. 111). This meant, of course, that Avina was unable to satisfactorily perform some of the jobs she, herself, admitted being responsible for (*see* Tr. 23-25), and so could not comply with the Company requirement that

employees "are supposed to be able to perform all jobs in the labor category they are in" (Tr. 148). Coupled with her extreme slowness, especially unusual in an experienced employee (*see* Tr. 114), Avina frequently complained about her knee, wrist and back (Tr. 112). For example, Avina said that her knee was "swollen, painful when she stood still" (Tr. 112). Avina complained about her wrist, as well, which helps to explain why she was not fast at picking up pieces of the product one by one (Tr. 112).

Throughout the evidence presented by the Company for the purpose of detailing the difficult nature of the jobs Avina would be required to perform, there were identified numerous examples of related hazards to the safety of Avina herself, her fellow employees, and to the purity of the Company's product. For example, Avina would repeatedly have to climb stairs to get to the carrot area (Tr. 37), or the broccoli line (Tr. 39). The wet surface of the wooden stairs is slippery and could constitute a hazard for an employee with Avina's condition (Tr. 59). Since the employees tend to go up and down the stairs in groups (Tr. 39), if one employee fell she could easily take several others with her. Similarly, given that there is a great deal of water on the floors in the plant (Tr. 39, 58-59, 60-61), the risk of falling for an employee with Avina's condition is especially high. The employees tend to work in close physical proximity with each other, and if, for example, one fell onto a belt, other employees might easily be injured (Tr. 47). If such an accident occurred on the broccoli trimming line, where the employees must wield sharp knives, such a fall could prove disastrous. Avina had apparently already cut herself in this fashion (*see* Tr. 41-42). In addition, the Company has a distinct interest in avoiding accidents on the production line. Not only is the Company concerned about the safety of employees, but a fall onto a production belt, for example,

would unacceptably contaminate the product in the eyes of the United States Department of Agriculture (Tr. 47).[6]

Mr. Muth, the Company's Corporate Safety Manager, testified more extensively about the safety hazards especially dangerous for an employee in Avina's condition. He was most concerned, he explained, about her falling:[7]

> "Those kinds of injuries that tend to come from falls are generally the most expensive, if you believe in the National Safety Council's statistics. They're also frequent. We have conditions that are wet; we have things like going up and down stairs; we have water hoses, in spite of our housekeeping, that are sometimes out on the floor, and I was worried most about the falling. If she did fall in certain areas where she was working, such as a belt, and in that case she could entangle herself in a piece of equipment, like the carrot saw, and the other possibility is on the asparagus line where the line and wheel is where you could entangle yourself there at the turnover of the line, but mostly, I was worried about her falling down, falling down with a knife; falling down the stairs, something along those lines.
>
> "Q.: Now, in terms of potential risk of injuries to others, how would there be a potential risk of injury to others in conjunction from her falling or losing balance?
>
> "Q: If she was trimming broccoli, for example, and had a knife in hand, and lost her balance, either she

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[6]A similar problem is created by ineffective sorting. If an employee cannot pickup the tiny foreign objects or pieces of defective product quickly and efficiently enough, the product may go to market too contaminated to meet the quality grade level specified on the package, and the Company could experience problems with the USDA (Tr. 31). This sorting operation, of course, is precisely what Avina had a great deal of difficulty with. (*See* Tr. 112).

[7]It is useful to remember that Avina's accident record showed an extremely high proportion of injuries that resulted from falling.

could contact somebody else with it or cut them, or cut herself, or cause somebody else to fall. If she fell on descending steps, let's say, chances are she would take somebody else with her.

* * *

"Q: And did you reach any conclusion as to whether or not any restriction in her wrist would possibly increase the burden for other people to work with her?

"A: I thought about that, but it's along the same line. If she was descending the stairs, let's say, or even going up, and trying to hold a handrail and couldn't grip it, right, I did think that was a possible problem either for herself or for somebody else." (Tr. 146-147).

Before the hearing, Dr. Storey examined the same film and motion analysis descriptions which the Company presented at the hearing (Tr. 122). His reaction vindicated the Company's judgment that when he released Avina for work in September of 1979 he was not fully informed about just how difficult and strenuous Avina's job actually was. In fact, he testified, even before he was made fully aware of what her job involved Avina had had to talk him into releasing her for work:

"Q: Will you describe the circumstances under which you signed that document [the release]?

"A: Well, Angelina came to the office and said that if I — if I couldn't release her to return to work with no restrictions, that she couldn't return to the kind of work that she had been doing, and that she thought she could do that kind of work. At the time I felt that it was worth a try to see whether she was able to do that kind of work, so I gave her the release.

"Q: At that time were you aware of all the duties that were involved in her job?

"A: No, I wasn't fully aware of them, not comparing to what I know now.

"Q: You had not seen Company Exhibit 4 at that time, nor had you seen the movie?

"A: Right." (Tr. 127).

On cross-examination, Dr. Storey went even further:

"Q: And looking at it backwards, doctor, in spite of anything Angelina said to you in September, if you truly felt she had a physical problem that would make it dangerous to return to work, you would not have given her this release; is that correct?

"A: I think — *had I been really more aware of what the job entailed, I might have had second thoughts about giving her that release* for the reasons I've said. I think physically she can do it, but I think that — and if all I had to do was worry about Angelina Avina and nobody else, I think probably I would allow her to do that because if she can slow down, she can slow down as she gets tired. But after seeing that — after seeing that she has to keep up with a number of other people and so on, I think that possibly *the development of symptoms could not only be dangerous to her but possibly be dangerous to the people around her* having to work faster to work with her." (Tr. 130) (Emphasis added.)

Dr. Storey went on to elucidate the extent of physical disability suffered by Avina. Her wrist injury, he began, has resulted in residual deformity and some narrowing of the wrist joint (Tr. 116-117). He continued:

"Because of a mechanical abnormality, she's more likely, and most assuredly, will develop, as time goes on, changes of degenerative arthritis, or wear and tear changes in the wrist joint that otherwise might not have occurred for a long time." (Tr. 117).

Even now, he explained, Avina's right wrist is capable of ranges of movement significantly less than that of her left wrist (Tr. 117-118). Moreover, "[s]he had marked limitation on her right side. Her grip measured two pounds, measured on a dynamometer and 35 pounds on the opposite side" (Tr. 118) She also had serious problems with her right knee, in which X-rays showed "rather large degenerative changes in the knee consistent with the degenerative arthritis" (Tr. 118). Dr. Storey totally replaced the knee joint in January of 1978 (Tr. 118). At the hearing, he stated: "I think her ability to quickly regain her balance is impaired as a result of her knee surgery." (Tr. 124). Dr. Storey was concerned about the relative instability that resulted from the knee surgery, saying "the strength and the musculature about her knee on the right side is not normal" (Tr. 126). As a result, "she might have increased risk of falling" (Tr. 126). The following exchange sums up his concern:

> "Q: Is it accurate to say that, because of the operation, that she is less stable on her feet than most people?
>
> "A: I think that's a fair statement." (Tr. 126)

Working at Dalgety presented an especially great risk of injury for Avina because of the pervasive wetness, since "a wet surface is more likely to produce a slip than a dry surface" (Tr. 125). Dr. Storey added:

> "A: Well, I've already stated that I think that her ability to regain her balance quickly should she slip is impaired. Obviously, if she fell on a moving belt there is a chance she could become injured." (Tr. 125)

To add to her wrist and knee problems, Dr. Storey testified, Avina also has a serious deformity in her back. After her July fall at Alberson Supermarket, she was treated by Dr. Storey for extensive pain on her right side (Tr. 120). In the course of treatment, X-rays revealed that Avina suf-

fered from a congenitally defective back:

> "X-rays were taken and these showed the evidence of a pre-existing, or congenital lesion in the lower part of her back with a partial attachment of the lowest lumbar vertebra to the sacrum. This is something that she was born with. There was abnormal articulation of the joint at that level as well. So, that, mechanically, the lower part of her back was not normal; never had been normal, as a matter of fact." (Tr. 120)

The following exchanges illustrate Dr. Storey's opinion of the significance of Avina's various disabilities:

> "Q: Now, with the prosthesis in the knee and with the congenital process, if I may describe it that way — back condition, did that restrict her in any way, her ability to twist, to lean, to do things of that nature?
>
> "A: Well, I think, considering this is a problem that ultimately was discovered in her back, *her chances of developing problems in her back with repetitive motions of twisting, stooping, bending and lifting and so on has certainly increased.*" (Tr. 121) (emphasis added).
>
> * * *
>
> "Q: What about the fact that she works from time to time in very cold areas? Does that have any impact on the increased risk of injury to her?
>
> "A: Most people with degenerative arthritis or problems with joints tend to have more symptoms in colder damp weather, and for this reason I think that working in a cold and damp environment would be likely to increase whatever symptoms she might be having, both with the wrist, back and hurt knees." (Tr. 125-126).

Finally, Dr. Storey was asked which of the motions described in the motion analysis descriptions prepared by Mr. Cordrey would be likely to produce "problems which you consider were a risk to her health" (Tr. 123). Dr. Storey

responded as follows:

"A: Well, I felt that initially leaning would possibly produce problems with her back. I also thought, under basic operations, that repetitive wrist motions might be likely to produce problems with her right wrist as well. In addition to that, possibly grasping repetitively could probably give her problems there, too.

"Q: Now, in each of the particular items which you were given, there are references to wrist motions, and I assume that on each of these particular jobs where there were repetitive wrist motions that your prognosis was the same; is that right?

"A: Yes.

"Q: And likewise, with grasping or regrasping; is that right?

"A: I think grasping or regrasping, again, would be something again that might be expected to eventually produce pain in her wrists.

"Q: Now, what about leaning?

"A: I think leaning, if it was — if it were done either repetitively or constantly would be likely to at some point begin to give her back pain as a result of the problems that we have found in her back.

"Q: What about twisting?

"A: Well, does this mean twisting with arm twist, or twist —

"Q: Twisting upper thigh.

"A: Well, same thing. I feel the same way as I did about leaning, that repetitive twisting with the upper body, that it might again produce symptoms in her back." (Tr. 123-124).

Dr. Storey was careful to explain that he still believed Avina to be "physically capable" of performing each motion involved in the various jobs for which she would be

responsible (Tr. 132). The phrase, "physically capable," of course, said nothing about the risk of injury, rate of speed or efficiency involved (Tr. 136). Dr. Storey thought it would be impossible to predict exactly when further problems would develop (Tr. 128), but although the precise time at which it would be manifested was uncertain, there definitely was "increased risk of injury to her" (Tr. 135). In this regard, a question by the arbitrator himself elicited what was, perhaps, the doctor's clearest testimony:

> "The Arbitrator: Doctor, I have one question, if I may. I have a little different concern than these two gentlemen do. Perhaps mine is more akin to yours. I'm thinking of this lady as a human being, and what impact and effect it might have on her if she continues this work.
>
> "The Witness: Well, I think that it's — and I've tried to make this clear — that I think her chances of developing symptoms either with her back, possibly with her other knee about which she has complained on occasion to me, possibly with her wrist, *I think all of these problems are more likely to give her trouble should she continue in this kind of work than if she were to do some more sedentary kind of work.*" (Tr. 133) (emphasis added).

IV
ARGUMENT

A. The Non-Disciplinary Discharge Of Angelina Avina May Be Overturned Only If Clearly Unreasonable.

It is uncontroverted that Avina's discharge was not for disciplinary purposes. Arbitral authority recognizes that this is a factor which militates against overturning the Company's action. Facts which would render a disciplinary discharge unjustified may be more than adequate to justify a discharge where no disciplinary motive is present. *See*

Maremont Automotive Products, Inc., 37 LA 175, 176 (Kelliher, 1961). Where the discharge is not only non-disciplinary but is for medical reasons, the Company's actions must be judged by an especially lenient standard. In *Arkansas Chemicals, Inc.*, 51 LA 579 (Holly, 1968), for example, an employee had been discharged in a situation resembling that in the instant case. The employee, a lead mechanic, was diagnosed as having "degeneration of the lower disk interspaces with osteoarthritic changes of the spine." 51 LA at 580. He was discharged after negotiating a workmen's compensation settlement of $11,500, although his doctor indicated that he could resume work. 51 LA at 580. The arbitrator, while "sympathetic with the Grievant," 51 LA 582, ruled that, where the discharge was for medical rather than disciplinary reasons, the contract requirement of "sufficient cause" for discharge would be satisfied by all but the most outrageously unjust discharges. 51 LA at 581.

Although not all arbitrators have agreed that a Company need show virtually no justification for a medical discharge, they do agree that, if there is any way the Company's action may be characterized as reasonable, the discharge must be upheld. In *Purex Corp.*, 60 LA 933 (Doyle, 1973), the arbitrator noted that "[w]hatever personal disposition the arbitrator may have in favor of returning the grievant to employment, at least for a trial period," a medical discharge, even where there exists conflicting medical evidence as to the extent of the grievant's disability, must be upheld if "there is a rational basis for it in the record." 60 LA at 938 (emphasis added). Similiarly, in *Sealright Company, Inc.*, 61 LA 909 (Allen, 1973), the arbitrator refused to overturn a medical discharge, even though made on the basis of conflicting medical evidence, because of "the absence of any evidence of any *arbitrary, capricious, or discriminatory intent*." 61 LA at 914 (emphasis added).

The words may differ, but the concensus is clear: the Company's action in the instant case must be upheld unless it is shown to be arbitrary and capricious — not merely unreasonable, but *clearly* unreasonable.

B. Because The Record Demonstrates That The Company's Decision To Discharge Angelena Avina Was Not Clearly Unreasonable, The Discharge Must Be Upheld

The evidence presented at the hearing disclosed that three considerations combined to mandate the discharge of Angelena Avina. First, the medical records available to the Company, when viewed with an eye to the demanding nature of Avina's job and the safety hazards in the plant, indicate that allowing Avina to continue to work would create a serious risk of additional injury to Avina herself. Injury could come about either through the normal day to day strain of her job on her already weakened limbs, or alternatively through an accident resulting from her physical disability. Second, Avina's disability posed a frightening risk of injury to her fellow workers and to the ultimate consumers of the food product. If Avina's wrist, knee, or back gave out even momentarily, it could directly result in another employee falling, being cut or bruised, or otherwise injured. Moreover, the food product could easily become contaminated and so result in harm to the Company's customer.[8] Finally, the Company faced a strong likelihood of becoming liable for substantial sums should Avina, another employee, or an ultimate consumer be injured as a result of Avina's disability. As each of these grounds alone justifies the discharge of Avina, in tandem they conclusively establish the reason-

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[8]This is not to mention the likelihood of a run-in with the United States Department of Agriculture.

ableness of the Company's decision.

It is, of course, no longer open to serious question that an Employer has both the right and the responsibility to establish reasonable rules to insure the health and safety of the working environment. *E.g., Pepsi-Cola General Bottlers, Inc.*, 48 LA 649 653 (Luskin 1967); *Dayton-Portsmouth Foundry Company*, 34 LA 204, 207 (Stouffer, 1960). Pursuant to this right and responsibility, the Company has consistently implemented a policy of not allowing a person to work if it appears that there would be an undue risk of serious bodily injury to that person or his fellow workers (Tr. 50-51, 77-78).

In situations similar to that in the instant case, arbitrators have consistently upheld discharges. In *Pepsi-Cola General Bottlers, Inc.*, 48 LA 649 (Luskin, 1967), the discharged employee had been employed for nine years despite a history of back trouble over the past several years. 48 LA at 651-52. Eventually, however, the employee was discharged from his job as driver salesman after another accident. The Company had settled the employee's worker's compensation claim on the basis of a twenty percent disability of each leg. 48 LA at 650. During that process, the company had a chance to review his full medical history, just as in the instant case, which revealed substantial physical disability. Based both on the worker's compensation settlement, which indicated a twenty percent partial permanent disability, and on the employee's medical porfolio, which also indicated substantial physical disability, the employee was not permitted to continue to work.

The arbitrator upheld the discharge. He dismissed as irrelevant the Union's contention that the employee had shown he was physically capable of doing the job. Nor did it matter that the employee was willing to work. The arbitrator recognized that an employee faced with a medical discharge

often is ready to take the "calculated risk" that serious injury will result from continued employment "because of monetary considerations." 48 LA at 653. However, "[the employee's] willingness to 'take the chance' does not mean that the Company is required to share that risk." 48 LA at 653. In short, the arbitrator concluded, the issue was not whether the employee was physical capable of working:

> "Inherent in any employee's right to continue in employment is a requirement that he must be physically able to perform the duties *without undue risk to himself.*" 48 LA at 653 (emphasis added).

The extent of disability reflected by the worker's compensation settlement, although not determinative, was an important factor. 48 LA at 652. The main point, the arbitrator explained, is that

> "The Company is charged with responsibility for the continued safety of its employees and it is charged with the responsibility to prevent an employee from accepting undue risks by refusing to permit him to continue in employment under circumstances where he should not and must not be exposed to the performance of work of an unduly heavy nature." 48 LA at 653.

A similar case is *Dayton-Portsmouth Foundry Co.*, 34 LA 204 (Stouffer, 1960). In *Dayton-Portsmouth*, an employee of seven years was discharged because, in the course of processing a worker's compensation claim, the company obtained a doctor's report that stated the employee suffered from back trouble to such an extent that he should be rated at a 40 percent permanent disability 34 LA at 205). Eventually, the employee obtained a worker's compensation award which mirrored this finding. Accordingly, the Company determined that the employee could not do the job safely. The arbitrator upheld the Company's determination on two grounds. First, he noted that the right to protect employees

from injury is a well-recognized management right. 34 LA at 207. It was, he thought, self-evidently reasonable for the Company to accept a medical determination that the employee suffered from a 40 percent permanent disability. 34 LA at 207. Indeed, the arbitrator thought, the employer had a duty not to allow this employee to continue to work:

> "It would approach criminal neglience if the Company, with knowledge of Grievant's condition, put him in a position which could possibly cripple or further disable him, or would involve the safety of fellow-employees in the course of their employment." 34 LA at 206.

The second ground on which the arbitrator relied was:

> "[t]he potential liability of the Company under the Workmen's Compensation Laws if his condition is aggravated. Within the scope of managerial rights is the anticipation of liability which might arise because of the development and aggrievation of such physical defect." 34 LA at 208.

The Company, therefore, properly refused to allow the employee to continue working.[9]

The arbitrator in *Stouffer Chemical Co.*, 43 LA 225 (Black, 1965), expressly sanctioned an employer's similar reliance on the twin risks of further injury and further worker's compensation liability. The Company refused to continue to employ an employee who had injured his back, thereby aggravating an underlying congenital defect precisely as in the instant case. 43 LA at 1228. For where an employee's continued employment creates a risk of injury on the job to herself and her fellow employees, she also creates a risk of

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[9]While denying the grievance for the above-described reasons, the arbitrator directed certain unrelated affirmative action by the Company for reasons irrelevant to the instant case. *See* 34 LA at 209.

further Company liability under the worker's compensation laws.[10]

C. Because The Union Has Introduced No Evidence That Would Render The Company's Decision Clearly Unreasonable, The Grievance Must Be Denied.

At the hearing, counsel for the Grievant introduced evidence apparently designed to support five possible arguments that the Company's decision, otherwise unquestionably reasonable, was in fact clearly unreasonable. Counsel for the Grievant tried to make the following points: (1) Avina was "physically capable" of performing her job; (2) Avina herself declared that she was able and willing to do the job; (3) it is impossible to predict precisely when any further injuries to Avina or others or further symptoms of her permanent disability would manifest themselves; (4) the dollar value of the C & R actually reflected a permanent disability rating of something less than 62%; (5) Dr. Storey's release of September 6, 1979 somehow rendered the decision to discharge Avina clearly unreasonable. In fact, however, none of these points reflect on the reasonableness of the Company's decision.

1. It Is Irrelevant Whether Avina Was "Physically Capable" Of Doing Her Job.

It is true that Dr. Storey stated Avina was physically capable of performing her job. But this was never disputed.

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[10]Not surprisingly, arbitration reports are replete with cases upholding employer's decisions to discharge employees whose disabilities were signalled in whole or in part by worker's compensation proceedings. *E.g., Zellerbach Paper Co.*, 68 L.A. 69 (Stashower, 1977); *McGill Mfg. Co.*, 58 LA 1120 (Davis, 1972); *Universal Carloading, Inc.*, 51 LA 137 (Somers, 1968); *Arketek Ceramic Corp.*, 50 LA 1171 (Seinsheimer, 1967); *Bethlehem Steel Co.*, 39 LA 600 (Crawford, 1962); *Dayton-Portsmouth Foundry Co.*, 34 LA 204 (Stouffer, 1960); *National Fireworks Ordnance Corp.* 23 LA 349 (1954).

For, as Dr. Storey continued, mere physical capability bears no relation to the speed, efficiency, or safety with which the job functions are performed. Arbitrators agree that the relevant issue is not whether an employee is simply physically able to perform his duties, but rather whether he is "physically able to perform the duties *without undue risk.*" *Pepsi-Cola General Bottlers, Inc.*, 48 LA 649, 653 (Luskin, 1967) (emphasis added). In the instant case, the risk — both of injury to Avina herself, to her fellow employees, or to the consuming public, and of further financial liability on the part of the Company — was unquestionably undue.

2. It Is Irrelevant That Avina Says She Can Do The Job.

Even were it not overwhelmingly contradicted by her medical history and the record evidence, Avina's simple assertion that she can do the job does not reflect on the reasonableness of the Company's determination to terminate her. For the Company never said she could not do the job. It merely determined that she not do it *safely*. In essence, the thrust of the Grievant's contention is that, despite her demonstrably lessened physical capacity, she is willing to assume the substantial risk of further injury in order to continue working. But by continuing to work, she risks not only her own health but that of others. Moreover, she would take that calculated risk with full awareness that if she lost the gamble with her health she could obtain another worker's compensation award — at the Company's expense, of course. But even if Avina herself were the only one whose interests were at stake, the arbitrator would be compelled to uphold the Company's determination not to permit her to take the risk. The Employer has a duty not to employ a person who could be injured by that very employment:

"The fact that [the employee] because of monetary considerations is more than willing to accept the calculated risk inherent in the performance of work . . . would not justify the Company in permitting him to continue work . . . . The Company is charged with responsibility for the continued safety of its employees and is charged with the responsibility to prevent an employee from accepting undue risks by refusing to permit him to continue in employment under circumstances where he should not and must not be exposed to the performance of work of an unduly heavy nature." *Pepsi-Cola General Bottling, Inc.*, 48 LA 649, 653 (Luskin, 1967).

3. The Impossibility Of Predicting Precisely When An Injury Would Occur Does Not Reflect On The Reasonableness Of The Company's Decision

Dr. Storey made it quite clear that he could not predict precisely when Avina would reinjure herself or injure someone else as a result of her physical disability. All that was certain, he explained, was that there was a substantial risk of such injury. At the hearing, counsel for the Grievant seemed to believe that this uncertainty reflected adversely on the reasonableness of the Company's decision to discharge Avina. To the contrary, however, it was precisely that uncertainty which would have made any other decision irresponsible. For if the Company knew exactly when an injury would occur, surely it should have continued to employ Avina until just before that date. In the real world, however, things are not that simple. As Dr. Storey indicated at the hearing, Avina's condition definitely would get worse. He just could not say when. But it is not the Company's prerogative to play "Russian Roulette" with the health and safety of Avina herself, much less her fellow employees and the ultimate consumers of the food product. Instead, as

Arbitrator Stouffer declared in *Dayton-Portsmouth Foundry Co.*, 34 LA 204 (Stouffer, 1960):

> "It would approach criminal negligence if the Company, with knowledge of Grievant's condition, put him in a position which could possibly cripple or further disable him, or would involve the safety of fellow-employees in the course of their employment." 34 LA at 206.

4. It Matters Not That The C & R May Have Represented A Permanent Disability Rating Somewhat Less Than 62%

At the hearing, counsel for the Grievant introduced the testimony of N. Michael Rucka, an expert in worker's compensation law (Tr. 184-188). Mr. Rucka suggested that, because the dollar amount of the C & R may have included compensation for some things other than permanent disability, when the C & R was translated into a permanent disability rating it should have yielded a number somewhat lower than 62%. But this matters not all. The Company treated the 62% disability figure merely as an approximation by the parties of the extent of Avina's physical disability. Its importance in the discharge decision was dwarfed by the voluminous medical reports which set out in detail the various physical restrictions under which Avina labored.

Moreover, like any other settlement, the C & R represents a compromise between the positions of the adversaries. In all probability, therefore, the dollar figure and disability rating of the C & R is substantially lower than those claimed by Avina herself to be appropriate measures of her injury. Having once settled *down* to the instant C & R, she should not now be permitted to disparage the extent of disability it reflected. Finally, it must be remembered that the 62% disability rating tallies precisely with the Category "G"

disability rating assigned to Avina by Dr. Dohn. To the extent that the Company did rely on the general limitations described in the Rating Guidelines, therefore, it acted properly entirely on the basis of Dr. Dohn's report. In short, even if the dollar value of the C & R somewhat overstated the extent of disability it represented, that could not possibly have affected the reasonableness of the Company's decision to discharge Avina.

5. The Company Properly Discounted Dr. Storey's Release Of September 6, 1979

At the hearing, counsel for the Grievant made much of Dr. Storey's signing a printed form, dated September 6, 1979, that released Avina from work with "no restrictions." Counsel for the Grievant appeared to believe that, despite the absence of details or even a brief description of the circumstances under which it was given, this release should have swept away the comprehensive and detailed medical reports which unanimously described extensive physical disability in the Grievant. But this contention is contrary to the consensus of the large number of arbitrators who have faced the issue of discharges based on conflicting medical evidence.

A company faced with conflicting medical reports confronts a dilemma. If it wrongly discharges an employee, it has unfairly deprived some person of his livelihood. But if it wrongly permits the same person to work, it has unfairly endangered that person's health and safety, as well as the health and safety of his fellow employees and perhaps the people who ultimately will consume the products it manufactures. Some arbitrators are so sensitive to this dilemma that they will uphold a discharge based on the employee's physical disability even in the face of a recent doctor's release unless the employee has supplied releases from *all*

of the doctors involved. *E.g., American Smelting Refining Co.*, 65 LA 328 (Ray, 1975).

Coe Manufacturing Co., 63 LA 418 (Marshall, 1974), involves facts strikingly similar to those in the instant case. The grieving machinist in *Coe* suffered from heart trouble, became disabled, and began collecting disability insurance benefits. Subsequently, the employee attempted to return to work, presenting a slip from his doctor releasing him for work with no designation of restrictions. 63 LA at 419. Despite the release, on the basis of other medical evidence, the Company refused to allow the grievant to return to work in the belief that "his return to work would present a potential hazard to the grievant." 63 LA at 419. The arbitrator denied the grievance for two reasons. First, he noted, the return-to-work slip gave "no supporting detailed diagnosis and/or prognosis regarding the basis for the grievant's ability to return to work" after concededly being seriously disabled just three months before. 63 L.A. at 422. Second, when determining that the employee could not safely return to work, the Company "was to a greater degree exposed to the details of the actual nature, extent, and scope of the job content in question. . . .[and] could therefore gauge the actual tensions, stress and strain related to the Machinist's occupation more realistically than the grievant's treating doctors in this case." 63 LA at 423. In conclusion, the arbitrator noted:

> "[T]he Company was genuinely uncertain with respect to the status of the grievant's health. . .and properly resolved the question by taking a conservative medical approach to a possible recurrence and/or exacerbation of the grievant's prior serious affliction." 63 LA at 422.

These two factors are unmistakably present in the instant case as well. Dr. Storey's release was totally devoid of

"sufficient supporting medical detail of the grievant's asserted satisfactory physical condition." Furthermore, it is uncontroverted that the Company possessed far greater familiarity with Avina's job and the strain it involved than Dr. Story at the time he issued the release. Indeed, Dr. Storey himself stated that "had I been really more aware of what the job entailed I might have had second thoughts about giving her that release" (Tr. 130). In short, the holding of *Coe* is wholly apposite in the instant case:

> "It is found that the Company did not abuse its discretion in refusing to return the grievant. . .to his regular machinist's job. The Company, thus, did not act arbitrarily and/or capriciously in light of the seriousness or potential danger of the grievant's condition, in rejecting the grievant's return-to-work request, solely on the basis of the grievant's private doctor's return-to-work slip dated October 2, 1973. It is believed and therefore concluded that the Company acted reasonably in exercising its discretion *on the basis of all the grievant's medical information and facts available to it* at the time of the grievant's original return-to-work request on October 8, 1973." 63 LA at 421 (emphasis added).

V

CONCLUSION

The Company weighed all the evidence carefully and deliberated for nearly three months before it concluded that it had no choice but to terminate Avina's employment. The Company's own rule, that no person shall be permitted to work if it appears that there will be an undue risk of injury to that person or to fellow workers, demanded no less. Furthermore, coupled with that pressing concern was the Company's interest in taking reasonable steps to avoid future and certain liability under the Worker's Compensation laws.

In short, discharging Angelina Avina, though unfortunate, was by far the lesser of available evils. The Company was painfully aware that when it discharged her, regardless of the justification, it deprived her of her paycheck. But to continue to employ her, given the overwhelming medical indications of substantial physical disability and the virtual certainty of an increased harm, would have been foolish and irresponsible. For to discharge her would have been to feed the three-headed Hydra of risk: risk of serious harm to Avina herself, risk of serious injury to her fellow employees and the ultimate consumers of the Company's products, and risk of further liability for Worker's Compensation awards.

For the foregoing reasons, the arbitrator is urged to sustain the Company's discharge of Angelina Avina and deny the instant grievance in its entirety.

Dated: December 26, 1979.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY

A Professional Corporation

By: /s/ George J. Tichy, II
GEORGE J. TICHY, II

By: /s/ Michael B. Margolis,
MICHAEL B. MARGOLIS

Attorneys for Employer
DALGETY FOODS, INC.

DECLARATION OF SERVICE BY MAIL

I, Karin S. O'Halloran, hereby declare:

I am a resident of the County of San Francisco, California. I am over the age of eighteen years and not a party to the within-entitled cause; my business address is: 650 California Street, 20th Floor, San Francisco, California.

On December 26, 1979, I served the within arbitration brief on the parties by placing true copies thereof in sealed envelopes with postage prepaid thereon, in the United States Post Office mail box at San Francisco, California, addressed as follows:

Melvyn Silver, Esq.
BEAUZAY, HAMMER, EZGAR, BLEDSOE & RUCKA
Attorneys at Law
300 West Hedding
San Jose, California 95110

Oscar Ruiz
Business Agent
Teamsters Local 890
207 North Sanborn Road
Salinas, California 93905

I, Karin S. O'Halloran, declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on December 26, 1979, at San Francisco, California.

/s/ Karin S. O'Halloran
KARIN S. O'HALLORAN

APPENDIX G.

Decision and Award [in arbitration] (January 16, 1979).

In Arbitration Proceedings Pursuant to the Provisions of the Current Collective Bargaining Agreement between The Parties.

In the Matter of a Controversy between General Teamsters, Packers, Food Processors and Warehousemen, Local 890, Complainant, and Dalgety Foods, Inc., Respondent Involving the Discharge of Angelina Avina.

HEARING HELD:

Before RALPH F. DUNCAN, ARBITRATOR
At the Laurel Inn
West Laurel Drive
Salinas, California
on Friday, October 26, 1979
at 10:08 AM

APPEARANCES:

FOR THE UNION:

MELVYN D. SILVER, Esquire
BEAUZAY, HAMMER, EZGAR, BLEDSOE & RUCKA
300 West Hedding Street
San Jose, CA 95110

FOR THE COMPANY:

GEORGE J. TICHY, II, Esquire
MICHAEL B. MARGOLIS, Esquire
LITTLER, MENDELSON, FASTIFF & TICHY
650 California Street, 20th Floor
San Francisco, CA 94108

ALSO PRESENT:

ANGELINA AVINA
SOPHIE ARIAS
RUBY MAE BANDURA

R. L. BATTERSON
KENNETH L. CORDREY
GILBER Q. LOPEZ
BRIAN MUTH
N. MICHAEL RUCKA
STEPHEN D. STOREY

EXHIBITS

UNION:

1) Note dated 9-6-79

COMPANY:

1) Workers' Compensation Appeals Board order approving Compromise and Release, dated 7-6-79
2) Letter to Stephen D. Storey, dated 8-8-79
3) Letter to Dalgety Foods, Inc., Attention Bess Shimmon, dated 8-13-79
4) Letter from Phillip Dohn, dated 3-5-79
5) Motion Analysis Description by K. L. Cordrey, dated 10-18-79
6) Rating Plateau Guideline for Work Capacity

JOINT:

1) Collective Bargaining Agreement, dated 7-1-76 to 6-30-79
2) Letter to Angelina Avina, dated 9-12-79.

INTRODUCTION:

The question before the Arbitrator is, "WAS ANGELINA AVINA DISCHARGED FOR CAUSE WITHIN THE MEANING OF THE COLLECTIVE BARGAINING AGREEMENT?"

In light of the above question, the Arbitrator assumes the authority to impose a remedy should the findings and conclusions so indicate.

All witnesses were duly sworn and testified under oath. A full transcript of the proceedings was made available to the Arbitrator, the Union and respective counsel. The parties were permitted to call witnesses for testimony, and such witnesses were examined and cross-examined. Both sides introduced exhibits, and a roster of witnesses and exhibits is attached hereto.

The Arbitrator was impressed by the exemplary conduct of all who participated in the hearing or who were present during the proceedings. He has a special word of praise for the professional conduct and skills displayed by respective counsel in serving the best interests of their clients. The interpreter is due an especially high compliment for the extremely efficient and effective manner in which she functioned.

The parties hereto, GENERAL TEAMSTERS, PACKERS, FOOD PROCESSORS AND WAREHOUSEMEN, LOCAL 890 (hereinafter referred to as the UNION) and DALGETY FOODS, INC., (hereinafter referred to as the COMPANY) have had a long and successful labor-management relationship. The history of the administration of the collective bargaining agreement has been a peaceful one with a minimum of grievances and, within the scope of the Arbitrator's knowledge, a very minimal number of grievances that have had to be processed through the grievance machinery in the contract or pursued through the arbitration process. This speaks well for the honesty, sincerity and good faith of the competing parties in this matter.

FACTS:

The Company is in the food processing business - processing and packaging frozen foods. Its production schedule is not necessarily on a level because of the seasonal nature, the vagaries of weather, etc., that control the availability

of product; therefore, employment with the Company is sometimes somewhat intermittent. Ms. Angelina Avina has been employed from time to time since about 1972. It is indicated her last hiring date was in 1978. She was terminated on September 12, 1979.

The termination was not the result of any misconduct or malfeasance on the part of Ms. Avina. Rather, it followed the receipt of certain medical information by the Company, which, to them, seemed to indicate that her continued employment might represent a dangerous situation to her and, perhaps, to her fellow employees. It is realistic and natural to assume that the Company was also concerned about incurring further liability should Ms. Avina suffer further injury on the job.

The termination obviously, as the record will indicate, did not occur as the result of a snap judgment. It followed with what the Arbitrator can only consider to have been a careful investigation of the job factors in which Ms. Avina would likely be involved with continued employment and her medical history, statements by several doctors, considerations by the Personnel Department, the Safety Engineer, the Personnel Director and the corporate Director of Industrial Relations. Ms. Avina has an unfortunate history of injuries over a span of the last seven or eight years. These injuries include several cuts incurred on the job; a wrist injury which has diminished the utilization of her left wrist; she suffered an injury to her right knee, which resulted in surgery, requiring the installation of a prosthetic knee joint; in a subsequent fall, it was discovered that she has a congenital back disorder, which, in view of her circumstances, will continue to deteriorate for the balance of her life.

It was also a fact that Ms. Avina received a Worker's Compensation Award somewhat in excess of $22,000 in the not too distant past. It should be noted that this was not the

total cash received by her because some amounts were deducted for medical expenses and for weekly disability payments.

POSITION OF THE UNION:

It is the position of the Union that Ms. Avina should be reinstated to her position with full pay and benefits and all attendant rights of seniority and to be effective as of her return to employment date of September 7, 1979 and that all notices of termination, or discharge, be removed from her records. It contends that her termination was improper, a violation of the collective bargaining agreement and not for cause. This is fully elaborated on in the course of testimony at the hearing and in a brief submitted by Melvyn D. Silver, Esquire, dated December 12, 1979.

POSITION OF THE COMPANY:

In brief, it is the position of the Company that they did not violate the collective bargaining agreement in their termination of Ms. Avina, which is fully amplified in testimony submitted, exhibits submitted, and in the brief submitted by Tichy and Margolis, Esquires. They set forth, in various ways, that the Company was serving the interests of Ms. Avina, her fellow employees and, in some measure, out of practical necessity, protecting the Company against future liability. To quote from the Company's brief, "This termination did not come easily to Dalgety Foods, Inc. Dalgety is a company that prides itself on the fairness and consideration with which it treats its employees. The Company realizes that no job means no paycheck and that, as a result, an employer has a responsibility to its employees to discharge them only under appropriate circumstances. Dalgety takes that responsibilits very seriously. . . ."

The Company prays the Arbitrator, therefore, to sustain the discharge of Ms. Avina for the reasons set forth during the hearing, in the exhibits and in its brief.

DISCUSSION:

This is the kind of case that gives an Arbitrator some sense of feeling of what a Superior Court Judge must be confronted with when called upon to give a sentence requiring capital punishment.

In this instance, no one imputed evil, malfeasance or misconduct to Ms. Avina. Rather, it was a cumulative series of misfortunes, which appear, when taken in total, to have strong possibilities of multiplying and intensifying. As is indicated in the testimony, the Company did not hastily undertake the termination of Ms. Avina without some considerable thought and, undoubtedly, some soul searching. One cannot say that the Company acted in a frivolous manner. Rather, it seems a situation of a management group finding itself on the horns of a dilemma. They have their relationship with the Union and its members, their employees, to maintain on the one hand and operational and managerial considerations of a serious nature on the other. It is obvious that the Company had an awareness of the impact of their action on Ms. Avina, and it is doubtful if any management person involved really derived any satisfaction from having to face up to a hard decision and, consequently, making it. After hearing the testimony and reviewing the transcript, the Arbitrator could not escape the impression that the testimony of witnesses, the comments of Company counsel and the proceedings generally were couched in terms intended to show no animosity and no display or any act or utterance that could be construed as cruelty to Ms. Avina.

The Union and its counsel did a splendid job of representing Ms. Avina's interests. The Union's endeavors on her behalf are, at the very least, an excellent display of a Union's humanitarian interest in its members. Representative Oscar Ruiz, during the hearing and at other moments, was almost emotional in his display of interest in Ms. Avi-

na's welfare and well being. The Arbitrator, in a span of forty some odd years in labor-management relations involving nearly every trade, craft and business except seafaring, has witnessed or participated in many hundreds of cases of a similar nature. They are particular prevalent in the construction industry and some areas of manufacturing where injuries resulted in physical circumstances that left some employee no longer employable in the position occupied before the injury. As both counsel are aware, the most difficult and insidious are back injuries and problems, both congenital and incurred, and joint injuries. Business and industry do not have the license and liberty and the economic motivations that accrue to a professional football or baseball team where participants are used in their jobs until they literally become useless and are then waived because of injuries. In those cases where compensation is high and generous settlements are the order, we don't have the differences that are inherent in a normal, ordinary business.

These issues nearly always revolve around two areas: (1) Was the labor contract violated? (2) Was the employer hasty, frivolous or inconsiderate? There is a third consideration: Is the grievant's opinion of his, or her, ability to continue the occupation based on reality? Is the grievant motivated, or driven, by economic necessity, or by confidence in his physical ability to consistently perform the task at hand in an acceptable manner? The amount of the Workers' Compensation Award, the communications and testimony of Dr. Storey and the lawyer for Dr. Dohn served to indicate the severity of the injury to which they were addressing themselves. The history of other injuries served to emphasize the cumulative effect of these injuries, and taken in combination with the record, indicates a strong possibility of future injuries unless Ms. Avina conducts herself very, very carefully and does not get involved in a hazardous

environment.

The filmed presentation regarding the work she would be required to perform was interesting but, in this Arbitrator's case, provided little new information because of his considerable involvement in labor-management problems in the frozen food industry and the number of plants he has had occasion to tour and observe the work performed. While there may be variations in procedures from plant to plant and safety and health conditions may be better in some plants than in others, the activities required from workers are essentially the same. Ms. Avina's arthritic condition can only, by any standard of measurement, be expected to progressively deteriorate. This is not her fault. It is an unfortunate fact of the disorder.

The back condition will probably not get better and has high possibilities of getting worse, especially if she should suffer another fall. No improvement can be reasonably anticipated insofar as her wrist is concerned and, with the presence of arthritis, one can assume that it is degenerative. In the case of her prosthetic knee, it would seem reasonable to conclude that she will have ever-increasing difficulty in spending a full work shift standing before a belt or a table, and indulging in motions that exercise her arms and back, causing constant shifts in the weight on her legs and feet. The wet environment and the necessity to use stairs, occasionally or frequently, presents a real impediment to her well being.

The Arbitrator was a little less than enthusiastic about the testimony of Dr. Storey. We are sure the Doctor, among other things, was cognizant of Ms. Avina's economic need to keep employed. One can assume that he must have been strongly implored to prepare and dispatch a letter of release. As he noted, quite honestly, in his testimony, had he been provided with all the information that became available sub-

sequent to that letter, he perhaps would have had "second thoughts". It is hard to conclude that such dramatic improvement occurred during the few days that passed between his first letter and the second letter. A busy and popular practitioner, such as Dr. Storey, cannot give his full time and attention to just one patient. He must have myriad considerations of a very serious nature, which occupy his thoughts day and night. What the Arbitrator considers to be somewhat of a discrepancy between the two letters does not constitute a reflection on, or of, Dr. Storey.

The Arbitrator has intensely considered the provisions of the collective bargaining agreement and the points made in Union counsel's brief. Casting aside, for the moment, the contract provisions and legal points at hand (although these are not being abandoned), the Arbitrator also must consider this matter in terms of its impact on Ms. Avina as a human being. The question arises: What will the impact and effect on her be if she is returned to her employment with the Company? We do not know Ms. Avina's age, but would suggest that, under normal circumstances, she must have a life expectancy of at least a couple of decades. The question is for how long, in her circumstances, could she perform this work? Would it be a month, a season or a couple of seasons? This, of course, we do not know. We do truly believe that manual labor of the type required on this job and, for that matter, any other kind of job that may become available to Ms. Avina, will severely shorten the productive span of her life. This Arbitrator has never been able to escape these considerations in matters of this kind. The Arbitrator is also aware that many other arbitrators have considered injury matters from this point of view. As a human being with a modicum of consideration for your fellow man, one can do no less.

From the Company's point of view without, at this moment, taking monetary or potential liability situations into consideration, one can point out that retaining Ms. Avina in the job she occupied, would impose a burden on direct supervision (floor ladies, foremen, etc.). They would have to be conscious of her circumstances and condition and would either make allowances or grant privileges that could create difficulties with others in the work force or they could constantly barrage management personnel with complaints about her performance or use it as an excuse for productivity failures. Certainly those charged with managing the plant, handling personnel and safety matters could be subject to criticism and, perhaps, worse from corporate authorities whose principal concern is an efficient and, hopefully, profitable operation.

Those representing Ms. Avina in this matter should investigate the possibility of Social Security Disability compensation or other facets of State or Federal aid that may be available to persons in these difficult circumstances. The Arbitrator suggests that they know more about this than he does and will undoubtedly pursue it. Another matter that could be explored by both the Union and the Company is the opportunity to fill some semi-sedentary position within her capacities and abilities. The Arbitrator does not know if the Company has any positions of this nature that would come within the scope of her abilities, but this is a matter that could be appropriately dealt with between Mr. Ruiz, the Business Representative, and Mr. Lopez, the Personnel Director or other Company officials. Again, from a humanitarian standpoint, this deserves their mutual attention and a cooperative spirit, and not under combat circumstances.

DECISION AND AWARD

It is the conclusion of the Arbitrator that the Company did not violate the collective bargaining agreement, was not arbitrary or capricious in reaching its decision;

therefore, the Arbitrator is compelled to deny the grievance and sustain the discharge.

DATED: January 16, 1980

SIGNED: /s/ Ralph F. Duncan
RALPH F. DUNCAN,
ARBITRATOR

APPENDIX H.

Minutes of Hearing and Summary of Evidence [in Section 132a hearing] (February 5, 1981).

California Workers' Compensation Appeals Board.

Angelina Avina, Applicant vs. Spiegl Foods, Inc., and Mission Insurance Co., Defendants. Case No. 76 SAL 8071, 77 SAL 9360.

Place and Time: SALINAS, February 5, 1981, 9 a.m.

BUTLER, W.C. Judge.

Reporter: White.

Appearances:

Applicant present

BEAUZAY, HAMMER, EZGAR, BLEDSOE & RUCKA (N. Michael Rucka appearing), attorneys for applicant

SALLY GUTIERREZ, Spanish interpreter

LITTLER, MENDELSON, FASTIFF & TICHY (Michael B. Margolis and George J. Tichy II appearing), attorneys for defendant Dalgety Foods, Inc.

Witnesses:

Gilbert Q. Lopez (Appl)
Bessie Shimmon (Appl)
Brian Muth (Appl)
Angelina Avina (Appl)
Stephen D. Storey (Deft)
Gilbert Q. Lopez (Deft)
Brian Muth (Deft)
Ruby Mae Bandura (Deft)
Sophie Arias (Deft)

Exhibits:

Appl. Ex. 6: (Renumbered, previously Deft. Ex. H) Transcript of arbitration proceedings

Board Ex. X: Reports of W. Porter Forcade, M.D., Stephen D. Storey, M.D. & John R. Hays, M.D.

DISPOSITION: The matter will stand submitted.

SUMMARY OF EVIDENCE

GILBERT Q. LOPEZ was called as a witness on behalf of applicant, sworn, and testified substantially as follows:

He is the personnel manager at Plant 10 for Dalgety. He has had that position for not quite two years. Before being personnel manager he was a line foreman for six to eight months. He does not recall ever having supervised Mrs. Avina when he was a line foreman.

He knew the standard of work required and knew the routine and policy regarding warnings for substandard performance. When the decision to terminate Angelina Avina was made he was the personnel manager. The decision was made or communicated to him by Brian Muth. He does not recall the contents of the conversation. Mr. Muth's position was safety director, and also did some work in personnel.

The witness does not recall whether or not he reviewed Angelina Avina's personnel file at the time of her dismissal. He was told by Mr. Muth to terminate. The instructions were oral. The letter of termination was prepared by Mr. Muth for Mr. Lopez's signature.

He recalls that there was concern that Mrs. Avina might hurt herself further.

The witness was not employed by Dalgety when Angelina Avina returned to work in January or early '79. He does not know of any absences between January and July of '79. He has checked the file, but he has no recollection of any such contents.

He thinks the termination may have been discussed with Angelina Avina. This testimony is in conflict with his dep-

osition, lines 20 and 21, page 11.

The witness was referred to Exhibit 2 of the Batterson deposition. This is the letter that was prepared by Brian Muth for Mr. Lopez's signature.

He was referred to Exhibit 2 to the deposition of Brian Muth. His recollection is refreshed, that the request for examination by Dr. O'Neil was not done.

He believes there were discussions with Brian Muth before the decision to terminate was made. He does not know what work Angelina Avina did after February '79 as compared with the job she did before her injury. He was not aware of any restrictions on her work capacity.

BESSIE SHIMMON was called as a witness on behalf of applicant, sworn, and testified substantially as follows:

She is a registered nurse working as an occupational health nurse for Dalgety, and before that at the predecessor Spiegl Foods at Plant 10.

She deals with employees for sickness or injury, and Mrs. Avina was one with whom she dealt. She knows of the return-to-work in September and no restrictions were imposed at the time of the return to work.

She knows that the applicant continued to work until on or about July 10, 1979. She recalls no records of lost time between January and July of '79.

In August of '79 she wrote to the doctor (Storey) about work restrictions. She was referred to Exhibit 4 of the Batterson deposition. Dr. Storey did preclude working in cold.

She does not recall any on-the-job injury after January '79, but is aware of an off-the-job injury in July of '79.

There were only two inquiries made of Dr. Storey. One was her letter of August 8th; it was written because of the non-industrial back injury which was brought to the wit-

ness's attention. She had seen an excuse from Dr. Storey taking the applicant off work with a back injury. She later saw a release for return to unrestricted work. She then requested further clarification, but is very unsure as to the dates particularly as they relate to the date of September 6th. She had no conversation with Mrs. Avina. She may have been asked about Mrs. Avina's ability to return to work after the July '79 injury.

The signature on the bottom of the Exhibit 4 of the Batterson deposition is her emergency medical technician, and that person assists the witness.

She did not have authority to authorize the return to work or termination of Angelina Avina.

BRIAN MUTH was called as a witness on behalf of applicant, sworn, and testified substantially as follows:

He is the Director of Industrial Relations for Dalgety. He has supervision over Plant 10. In 1979 he was the safety manager for Plant 10. His background is in personnel management and safety administration. He is not an engineer, nor is he medically trained. In the area of medical and engineering matters he has to rely on properly trained experts.

He became aware of Mrs. Avina's problem because a copy of the Order Approving Compromise and Release crossed his desk. The size of the sums drew his attention, and he called personnel and the medical facility to investigate the nature of the problem. At this time he did not have Mrs. Avina's industrial medical file, it being in the possession of the insurance carrier. He received it several weeks later, probably more than 2 and less than 4.

He had immediate access to her personnel file, and he reviewed it early in the process of investigation. No reprimands nor warnings were noted in '79, and no restrictions were indicated in the file. After discussion with the insur-

ance carrier he concluded that the degree of disability contemplated by the Compromise and Release was about 62%, which related to a degree of disability substantially the equivalent of a restriction to semi-sedentary work.

He did not discuss with the carrier the distribution of the Compromise and Release between past and future medical expenses or costs. He was aware of the degree of the rating before he got the doctor's files. He was informed by the insurance carrier that the case was compromised in that it could have rated as high as 83% permanent disability.

He started to investigate, but does not recall whether he saw Dr. Storey's release as early as July of '79. He also relied on conversations with Bess Shimmon on that relating to medical records of some 7 or 8 injuries, primarily falls, starting about 1972. She also indicated she was aware of complaints of pain and discomfort made by Angelina Avina since about March of '79.

He never directly supervised Mrs. Avina, nor knowingly observed her in her work.

There is no policy of the company to terminate employees with semi-sedentary restrictions. The report limiting her to semi-sedentary work was not in the company personnel file when the Order Approving Compromise and Release came.

He did not discuss the matter with Dr. Storey. He requested no separate opinion from Dr. Storey's office regarding the release.

He drafted the letter that went out over Mr. Lopez's signature. In coming to his conclusions he paid particular attention to the opinion of Dr. Dohn and Dr. Storey, and his particular concern was about falling and the potentiality for injuring not only herself but others.

He was present during the arbitration testimony. He recalls the "no restriction" report from Dr. Storey, but relied

on his earlier opinion.

The witness was referred by the W.C. Judge to the Collective Bargaining Agreement wherein there are certain job descriptions. Three of them were read to the witness inquiring why these jobs would be beyond the physical capacity of Angelina Avina. One is the job of Wrapper Feeder, and that job does require tending of the machine in the event of minor malfunctions, which description is not contained in the Collective Bargaining Agreement, and that particular portion of the work would be beyond his concept of her disability. He is not familiar with the job of a Raw Product Checker. He did not consider assignment as a Lab Worker. He believes the Butter Sauce Dispenser job is not done at the Plant 10.

He was referred to Exhibit 1 to the Batterson deposition. This document was prepared by Corina Coloma, who was payroll clerk in Personnel. The reason entered there for termination was entered without instructions from Mr. Muth. The reasons stated are wrong. The reason stated in the Lopez letter is an accurate statement for reasons of termination. He was present at the Batterson deposition.

His primary reason for termination is he believed there was a high probability of future injury to Mrs. Avina because of her degree of disability, particularly the probability of falls.

ANGELINA AVINA was called, sworn, and testified (through Spanish interpreter Sally Gutierrez) substantially as follows:

She had an accident to her leg in 1976 and was off work for a couple of months, and returned to work at Dalgety doing plate casing in the freezer. This involves packing small boxes. It is done standing, and involves bending, lifting of the boxes when packed, putting them on a belt; you put 24 small boxes into a big box. It involves twisting

and rotating. This is a premium job and is harder than other jobs, and requires you to work rapidly.

Until her surgery in 1978 she never turned down work. She was off work about a year after the surgery. She had a release to return to work when she went back to Dalgety. The release was from Dr. Storey. She returned to her regular work. She did plate casing most of the time, the other times she simply went where the foreman sent her.

After the return to work in 1979 she did the same work that she had done previously. She went up and down stairs both before and after the surgery. She did it without difficulty after the surgery in 1979. She also worked over time.

On July 10th of 1979 she had an injury at Albertson's. Immediately prior to that accident she was doing her regular work. The injury at Albertson's was a slip and fall in the vegetable section. She slipped on water on the floor. The slip and fall was not related to the knee problem. She landed in a sitting position and injured her back, and went to the hospital.

STEPHEN D. STOREY, M.D. was called out of order by dendants, sworn, and testified substantially as follows:

He last saw Angelina Avina in January 1980, but ordered a prescription refilled in October 1980.

She has degenerative arthritis. He was the operative surgeon on the knee. She had other complaints, including back pain, wrist pain from a fracture, and complaints of right ankel pain.

He recalls the release of September 1976. Since then he has seen a film of her job and a motion analysis. He feels that she could do these kinds of work from 10 days to 2 weeks, but believed they could not be done on a permanent full time basis, or it would result in an increase of symptomatology to a level in which she could not perform the

work.

He did not believe the restrictions were necessary as a prophylactic measure, but was of the opinion that the applicant would be unable to perform the regular task of her work without the production of disabling symptoms. The fact of her actual return to the performance of that work for a period of six to eight months and performing it without the increase of symptoms, he believes, demonstrates that he was not correct in his conclusion that she would be unable to do so.

ANGELINA AVINA was recalled to the stand and continued testifying substantially as follows:

She received a release to return to work from Dr. Storey after the fall at Albertson's. The release was without work restriction. She reported to the office of Dalgety and gave the slip to Corina and Jessie. She was told to report Monday, and was asked which shift she wanted, and she selected the night shift. She chose that shift because she could get more hours and more money. She knew what shift she was to return to but did not know the job assignment. At that time she felt able to do any job in the plant.

Corina told her to wait, and called the nurse while she was at the office. The nurse told Corina to look in the records and there was a discharge notice there. The letter was read in Spanish to the witness and it thanked her for her employment with Dalgety and told her there was no work for her.

She has found other work, but didn't find it immediately. She is now working at Bud Antle's in lettuce trimming for salad. She found the job there in May of 1980. It involves trimming and putting the lettice on a belt. It is a standing job involving twisting, turning and pushing the lettuce. She works with a knife. The job is similar to what she did at

Dalgety except the freezer at Bud Antle's is colder. Her legs are not causing her trouble in this job, her back is not causing her trouble, and her arms are not causing her trouble in this work.

She is not working at Bud Antle now because the season is over. She did have an accident in October and lost some time when she injured her left little finger. She has been called back and will return to work in the new season.

The conversation with Corina took place on a Friday, about the sixth of September. She saw the document but she cannot read English and it was read to her by Corina.

The fall at Albertson's was in water and not on debris. She has filed a charge with the federal government for discrimination against the handicapped related to this accident.

She was present during the arbitration hearing. She was represented by Mel Silver. The hearing was conducted in English.

She has been recalled to Bud Antle but the date is not set. By the time she was released for work from the finger injury the season was over.

Applicant rests.

MR. MARGOLIS: Your Honor, at this point we have several motions we'd like to make. The first is, we'd like to move to dismiss the application for increased benefits under Section 132(a) on the grounds that the relief sought has already been determined by the arbitration proceeding, and no appeal of that decision from that proceeding has been sought within the period of time set forth by the California Code of Civil Procedure.

JUDGE: Denied. For the record, counsel, that's tantamount for motion for summary judgment or dismissal before the Board; it's my belief that a decision on the merits

has to issue rather than a dismissal at this point. It doesn't reflect on the merits of your contention, merely that that's not the proper remedy.

MR. MARGOLIS: Your Honor, we would contend that it is the proper remedy, given the state of the record. However, I'd like to make a second motion. That motion is that the application be dismissed, or if you like, we be granted summary judgment on the grounds that the matter herein is preempted by federal labor law, as much as the subject of this dispute has already been resolved in collective bargaining process.

JUDGE: Counsel, your record is preserved on that. I am denying the motion because this Board, under the California State Constitution, cannot rule on the constitutionality of the acts vesting jurisdiction in the Board. I do not intend to rule as to the merits of the motion, and it is denied.

MR. MARGOLIS: Our third and final motion at this time is the application be dismissed and/or summary judgment granted because the factual issues in this proceeding have already been determined in the arbitration proceeding, and res judicata requires that the same rule be obtained.

JUDGE: That motion is denied. I don't believe the issues are the same, and on that in particular, counsel, I'm relying on "Judson Steel."

MR. MARGOLIS: I'd also like to make one final motion, for dismissal or summary judgment based on the collateral estoppel, or the preclusion of the factual issues in this matter as opposed to the legal defect.

JUDGE: That motion will be deferred. I'll defer ruling on it, and I believe that that may go to specific issues but not to the entire case, and I want to consider that carefully. I'm concerned about it.

GILBERT Q. LOPEZ was recalled by defendants and testified substantially as follows:

Shown Exhibit A, page 73, the job of Butter Sauce Dispenser does not exist at Plant 10. Laboratory Worker shown at page 70 requires the passage of a written test and bi-lingual ability. The job of Raw Product Checker requires a written test and bi-lingual ability.

Mrs. Avina was a Bracket 5 employee. There are a number of different jobs in Bracket 5. Employees are required to be able to perform all jobs listed on page 79, other than the premium jobs, to remain employed in a Bracket 5. Premium jobs have to be bid on by seniority and ability.

BRIAN MUTH was recalled by defendants and testified substantially as follows:

He is familiar with the practice in the industry under the Collective Bargaining Agreement.

The applicant worked in the general labor classification, Bracket 5.

The witness reiterates that the Order Approving the Compromise and Release brought the problem to his attention but was not the basis of discharge. His basis for the discharge was his view of the job analysis and the disability indicated by the physicians. He determined the degree of permanent disability by talking to the carrier, and as to what factors were involved in the Compromise and Release. He was told it was based on 62%. He checked the plateau guidelines probably after talking to Mrs. Avina, but he is not positive.

He asked the nurse to set an exam with Dr. O'Neil. This was not done because she was already under the care of Dr. Storey. He reviewed Dr. Dohn's report of March 5th, 1979. He reviewed the plateau guidelines, including the definition of semi-sedentary work. He could not assign work in a semi-sedentary category to the witness.

Termination did not take place immediately because of one, the report of the fall in the super market, and two, the request for review by Dr. Storey because of the fall.

He investigated the off-the-job incident just as he would on the job to determine whether or not there was an impairment. He asked Mrs. Shimmon to write a letter describing the job. He was referred to Defendant's B. He saw the letter from Dr. Storey to Bess Shimmon; it added information about the back abnormality. He later learned the abnormality was congenital. It was taken into consideration with the other accidents and conditions, particularly where Dr. Storey expressed the opinion that it would be impossible and possibly dangerous for Mrs. Avina to reach across a conveyor belt.

The description of the job by Mrs. Shimmon is accurate but incomplete. Basically, it touches the highlights.

He saw the release with restriction of September 6th from Dr. Storey, but because of the previous narrative report he did not accept that opinion.

The applicant's history involved primarily fall type injuries. He was concerned about future falls being more probable, particularly in view of the fact that there are certain hazards in the plant, such as hoses and water which cannot be eliminated. He was also concerned about the aggravation by cold, but in particular the problem relating to falls most concerned him, though he was aware of the job analysis relating to the number of repetitive motions of the arms and wrists.

He is familiar with the broccoli line. There are wooden stairs there which are frequently wet, and the jobs involve wielding a knife; the carrot line has a shrouded knife. There is a conveyor, and a person falling on it could be pulled towards the knife.

He was referred to Cordray's analysis of the hand and arm motions, and while aware of them and they being of some concern, they were not primary.

Dr. Dohn's letter referred to a loss of right handed grasping power of a substantial nature, and that indicated to the witness that there was a hazard of the applicant being unable to retain a knife in falling or having a weakened grip increasing the hazards of a probable fall.

He discharged her because her physical impairments made her a high risk of further injury or injury to others. There is a company policy not to assign work to a person who is impaired if so doing creates an unacceptably high risk of injury.

There is a lot of water around the plant and there is a safety problem relating to debris and hoses. Statistically, a fall while working on the level ground is more frequent than a fall from a height.

Bess Shimmon's letter does not refer to the back injury itself.

He does not know the order of events of the inquiry on the ability to work. The Cordray document was prepared on or about October 18, 1979.

He had received complaints that Mrs. Avina complained of pain and discomfort on the job and had asked to be moved to a more comfortable work situation.

He was aware there was a time loss between the surgery and her return to work, and is aware that she continued to work for some time subsequent to the injury and taking the time off, and he is aware she worked between the injury and taking time off for the surgery.

He has reviewed material relating to the scope of the numerous falls.

RUBY MAE BANDURA was called as a witness on behalf of the defendants, sworn, and testified substantially as follows:

She is employed at Dalgety as a floor leader. She has been so for 15 years, and has worked at Dalgety since 1955. She knows Angelina Avina and has observed her work performance. She is a slow worker, one of the slower 3 to 4 workers whom she supervises. She has received complaints from foremen about Angelina's slowness, and complaints from other workers.

The asparagus pack involves primarily straightening, weighing, checking, and wrapping. Angelina could be used on any of the general production jobs on the asparagus pack other than the wrapper. She used her primarily straightening.

She supervised Mrs. Avina off and on for about 15 years.

SOPHIE ARIAS was called as a witness on behalf of the defendants, sworn, and testified substantially as follows:

She is employed at Dalgety as a floor leader. She has been there about 20 years, and a leader about 17 years. She is the leader in the retail asparagus pack. At times she supervised Angelina Avina. She is considered a slow worker.

She supervises about 60 employees. No workers are slower than Angelina, but she is one of the four or five slowest. She has received complaints from the foremen about her speed, and also from co-employees.

Angelina has complained to her during the period of March through June of 1979 about discomfort in her wrists and knees.

She usually had Angelina working on checking. She has supervised her off and on since she started.

APPLICANT was recalled:

The plate casing work is very fast and is reserved for the fastest workers.

GILBERT Q. LOPEZ was recalled:

It is not necessarily true that plate casing is for the fastest worker. There are two sections in plate casing, one of which is relatively slow.

The scheduling into plate case is done by personnel. Workers are evaluated before being assigned to plate casing. The hand casers are a premium job.

WILLIAM R. BUTLER
Workers' Compensation Judge

APPENDIX I.

Supplemental Findings & Award and Order [by California Workers' Compensation judge] (March 3, 1981).

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant vs. Spiegle Foods, Incorporated, and Mission Insurance Company Defendant. Case No. 76 SAL 8071, 77 SAL 9360.

The matter having been regularly submitted, WILLIAM R. BUTLER, Workers' Compensation Judge, makes his decision as follows:

FINDINGS OF FACT

1. Defendant, Dalgety Foods, Inc., did on September 6, 1979 discharge Angelina Avina in violation of Labor Code 132(a).

2. One-half of the compensation otherwise recoverable is in excess of $10,000.00 and applicant is entitled to increased compensation of $10,000.00.

3. Applicant is entitled to recover costs and expenses for the prosecution of the Petition in an amount not to exceed $250.00.

4. Applicant is entitled to reinstatement as an employee of Dalgety Foods, Inc. and to reimbursement of all wage loss and work benefits from September 6, 1979.

5. Defendant is entitled to credit against wage loss for all sums earned by Angelina Avina from any source since September 6, 1979.

6. Applicants' counsel has rendered legal services to the applicant in connection with the prosecution of this Petition of at least $2,500.00 which is allowed as a lien against the increased compensation set forth in Findings 2. Applicants'

counsel is also entitled to an additional fee of 25 percent of any amounts payable under Findings 4 and 5 and is allowed a lien in such percentage.

AWARD

AWARD is made in favor of ANGELINA AVINA and against DALGETY FOODS, INCORPORATED of increased compensation of $10,000.00 less $2,500.00 payable to Rucka, O'Boyle and Lombardo; together with reinstatement as a employee by Dalgety Foods, Inc. as set forth in Finding 4; together with reimbursement for all wage loss as defined in Finding 4 and 5 above, less 25 percent payable to Rucka, O'Boyle and Lombardo in accordance with Finding 6 above; together with reimbursement of any work benefits lost; and, of expenses and costs reimbursement for the prosecution of this petition in accordance with Finding 3.

ORDER

IT IS ORDERED THAT jurisdiction be reserved at the trial level to determine the amount of wage loss and credits thereunder pursuant to Findings 4 and 5, upon the filing of a Declaration of Readiness and supporting documentation to establish the same.

ORDER

IT IS FURTHER ORDERED that this matter be referred to the commissioners in care of the Office of the Secretary of the Workers' Compensation Appeals Board for such action as they deem necessary, inasmuch as the Petition for increased benefits has been granted, and inasmuch as the Petition for prosecution was abated pending determination of the Petition here in question; such abatement being at the request of the parties. The Petition requesting prosecution is for criminal violation of Labor Code Section 132(a) and, therefore, referred to the Commissioners.

WRB:db

/s/ William R. Butler
WILLIAM R. BUTLER
WORKERS' COMPENSATION
JUDGE

DATE: March 3, 1981

SERVED ON ALL PARTIES BY MAIL
ON THE OFFICIAL ADDRESS RECORD.

BY: /s/ Deena L. Briggs

APPENDIX J.

Opinion on Decision [by California Workers' Compensation judge].

Workers' Compensation Appeals Board, State of California.

Case No. 76 SAL 8071, 77 SAL 9360.

Angelina Avina, vs. Spiegl Foods, Inc. and Mission Insurance Company.

Judge: William R. Butler.

Injury: 7-19-76 & 3-1-68 to 7-19-76.

OPINION ON DECISION

This Petition was of greater than ordinary factual and legal complexity and difficulty. Therefore, I have awarded extraordinarily large fees, i.e., 25 percent of the recovery.

I am of the opinion that there is direct controlling authority, binding on me and compelling this decision when the facts as I understand them exist. That authority is the holding in *Western Electric Company vs. Workers' Compensation Appeals Board*, (Lahoma Kay Smith) *99 CAL APP 3d 629; 44 CCC 1145*. The court held as follows:

"Western asserts it discharged Smith as there was no work available which she could perform without the risk of either re-injury or further injury. If this is the true reason, Western refused to allow Smith to return to work, then there was no Section 132(a) violation. . .

However, if Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself, then the Board could properly draw an inference of prohibited discriminatory action by Western, unless Western can otherwise demonstrate to the contrary."

The reason for the discharge, as testified to by Brian Muth, is that "there was no work available which she could perform without the risk of either re-injury of further injury."

He (Muth) come to this conclusion because of (a) the degree of disability contemplated by the amount of the compromise, (b) the opinions of Drs. Dohn and Story regarding the degree of handicap, (d) the analysis of the work environment and tasks and, (d) the history of several other industrial injuries.

Applicant demonstrated by the fact of her return to work for several months that she was capable of performing her work. After the non-work related incident, she was released by Dr. Story without restriction. Dr. Story testified that the opinion he gave regarding the factors of disability, upon which the case was settled, was predictive of an inability to do the work without the development of severely disabling symptoms, and was not a prophylactic restriction to prevent further injury. He further testified that the fact of successful performance of the work for several months demonstrates he was in error at the time of rendering his earlier opinion.

This is consistent with his later release to work without restriction. The Defendants have not demonstrated to the contrary. I therefore draw the inference of prohibited conduct.

As to the impact of the grievance procedure and arbitration, the position of the Defendant that as to factual matters, the doctrine of collateral estoppel applies, they are correct, but as to the question of demonstration before the Board, that she could have returned to work and performed her job without risk of further injury or re-injury, that issue was not before the arbitrator. The only issue there was, was the determination of whether or not there was a violation of the collective bargaining agreement. There was found to be none.

There was no determination made of whether or not the discharge was in violation of Labor Code 132(a), nor could there be.

I would point out to the parties several matters which I believe pertinent.

Labor Code 132(a) does not require a bad motive. Mr. Muths' motives are accepted by me as true, and genuinely considerate of Ms. Avinas' condition. I also assume the genuine motives of Ross Barnett, George Wallace, Orval Faubus, and the Board of Education of Topeka, Kansas in the early school discrimination cases.

The insurance carrier should have kept Dalgety better informed. For instance, Dr. Powlans' opinion was not brought to Mr. Muths' attention, had his attention been so directed, he could have asked those questions of Dr. Story (or Dohn) which were asked of the doctor only at the hearing on the Petition, and probably averted this trial.

It is easy to sound critical of Mr. Muth, and no such criticism is intended. He has no medical, nor engineering expertise, and I assume no legal expertise, and certainly not the level of a certified specialist in Workers' Compensation. This field of law, like all other, has its own jargon, and the subtle but very real distinction between prognostication of an expected inability to perform certain tasks, and a restriction imposed by medical advice, to refrain from those same tasks in order to prevent further harm, could not only fail to impress him with the need to investigate what the basis of that opinion is, it could easily escape the attention of anyone not faced with immediate problems, and also cognizant that there is a difference.

Both are compensible, and equally so, so that the ramifications of the doctors opinions escaped counsel when the case was settled.

One "unjust" result here is compelled by law. The compromise cannot be now reopened; I do point out, however, that had the case been resolved by trial or stipulated rating, a Petition to Reopen and Reduce would now lie.

I also strongly recommend to Defendant Dalgety that in the future it keep its insuror well informed as to the actual return to work of its employees and the level of work they are performing so that such facts can be brought to the attention of counsel and the physicians upon whose opinion the Board must rely, and to whom such information would be invaluable.

The contentions raised by Mr. Margolis in his letter of February 20, 1981 are met by the Western Electric case relied on by me. If he is correct as to the law, he must convince the Court of Appeal to change the Western Electric decision or to distinguish this case. His issues were raised and are preserved, but I find the Court of Appeals decision binding on me.

/s/ William R. Butler,
WILLIAM R. BUTLER
WORKERS' COMPENSATION
JUDGE

WRB:db

APPENDIX K.

Petition for Reconsideration [by Dalgety Foods, Inc.] (March 30, 1981).

Workers' Compensation Appeals Board of the State of California.

Angelina Avina, Applicant, v. Spiegle Foods, Inc., et al., Defendants. Nos. 76 SAL 8071 and 77 SAL 9360.

Filed: March 30, 1981.

I

INTRODUCTION

On March 3, 1981, the Honorable William R. Butler issued a decision in the above-captioned matter on the issue of liability under Labor Code Section 132a. The decision, consisting of Supplemental Findings & Award and Order and an Opinion on Decision, determined that Defendant Dalgety Foods, Inc. (hereinafter "Dalgety" or "Employer") had violated Section 132a by discharging the Applicant, Angelina Avina. Dalgety hereby petitions for reconsideration of that decision. This Petition for Reconsideration is based on the following three grounds, as is more fully discussed *infra*:

1. By the order, decision, or award made and filed by Judge Butler, the Board acted without or in excess of its powers;

2. The evidence does not justify the findings of fact;

3. The findings of fact do not support the order, decision, or award.

The Employer also hereby requests an order staying execution or, in the alternative, an order directing that no certified copy of the order, decision, or award be issued, pending a decision on reconsideration.

II

STATEMENT OF FACTS

The Employer hired Angelina Avina as a general production worker in 1978. On September 12, 1979, the Employer was forced to terminate her.

This termination did not come easily to Dalgety Foods, Inc. Dalgety is a company that prides itself on the fairness and consideration with which it treats its employees. The Employer realizes that no job means no paycheck and that, as a result, an employer has a responsibility to its employees to discharge them only under appropriate circumstances. Dalgety takes that responsibility very seriously. But, coupled with the Employer's concern for individual employees is a far greater concern for the employees as a group. Accordingly, the Employer follows an ironclad policy of not allowing a person to work if it appears that there would be an undue risk of serious bodily injury to that person or his fellow workers.

The Employer became aware that, due to an apparently substantial physical disability, Ms. Avina might present just such an unacceptable risk. Even then, however, termination did not come automatically. It was only after nearly two months of careful investigation and deliberation that the Employer decided it had no choice but to discharge the Applicant. There was simply too great a chance that her physical disability could create a situation in which her fellow workers, as well as herself, would be seriously injured.

Mr. Brian Muth, then Corporate Safety Manager, collected the relevant information: what Avina's job entailed, what her medical history revealed about her physical disability, and what the safety risks were. After his investigation, Mr. Muth concluded that continuing to employ the Applicant would create an unacceptably high risk of injury

to her fellow workers and herself. Accordingly, he recommended that Mr. Bob Batterson, the Employer's Director of Industrial Relations, discharge Ms. Avina. As was customary, Mr. Batterson followed Mr. Muth's recommendation.

Extensive evidence was presented at the trial concerning the investigation, and the facts collected in it, which formed the basis for the decision to discharge Ms. Avina. The possibility that continuing to employ her would run afou of the Employer's obligation to protect its employees from harm on the job first came to the Employer's attention in mid-July, 1979. At that time, Mr. Muth learned of an Order Approving Compromise and Release (hereinafter "C & R Order") which awarded Ms. Avina $22,628.80. It was an unusually large award, Mr. Muth thought, and suggested a very substantial physical disability. Mindful of Dalgety's policy of not assigning work to a person where risk to herself or others seemed unduly high, Mr. Muth began investigating the extent of Ms. Avina's physical disability.

The investigation proceeded on several fronts. First, Mr. Muth sought to ascertain the significance of the C & R Order in terms of the physical disability it represented. Mr. Muth checked the standard Table of Permanent Disability Indemnity and discovered that $22,628.80, the dollar amount of the C & R Order, equated with a 62% disability rating. He then obtained the independent opinion of Dalgety's compensation carrier as to the extent of disability represented by the C & R Order. His own opinion was confirmed. Moreover, Mr. Muth was advised that the C & R Order represented a compromise from at least one report which assessed Ms. Avina's disability at 83%.

However, Mr. Muth realized that the rating alone did not answer his questions. The Employer carefully eschewes a policy of discharging employees simply on the basis that

they had received a disability rating of some figure. A particular disability rating alone is inadequate to inform Dalgety whether an employee is too disabled to allow him or her to continue to work. Instead, the Employer must look to the particular circumstances of the case, including, for example, comparing which specific physical functions were impaired with which functions are necessary to the job so as to insure efficient production and the safety of the employees.

Dalgety follows a policy of reviewing the medical records of an employee if a potential problem with safety comes to light. Accordingly, after the compensation carrier confirmed that the C & R Order represented a disability rating of 62%, Mr. Muth sought more detail about the extent of physical impairment Ms. Avina suffered, including her medical background. To convert Ms. Avina's disability rating into specific restrictions on particular movements, Mr. Muth then consulted the standard Rating Plateau Guidelines For Work Capacity. Under those Guidelines, he learned that she fell into Category G, which meant she had lost over 50% of her ability to push or pull or perform similar tasks, and she was able to work only if half of the time were sitting, and half standing.

Mr. Muth also obtained extensive reports of various doctors which detailed Angelina Avina's medical history and her physical limitations. One thing that came to light was that Ms. Avina had suffered an unusual series of injuries during the prior seven years which required substantial time off for treatment and recuperation. For the most part, these injuries consisted of falls injuring her right hand and wrist, her right knee, and her back.

Ms. Avina's accidents began in 1972, when she fractured her right thumb. On June 21, 1973 she fell at work, fracturing her right wrist and left fifth finger. The fracture of her right wrist was severe enough to require that it be en-

cased in a cast. Less than three months later, while at home on September 17, 1973, Ms. Avina fell again and reinjured that same wrist.

Ms. Avina eventually returned to work after these injuries, but she suffered more accidents, as well — both industrial and non-industrial. On some uncertain date, probably December 10, 1975, she lacerated her right index finger with a knife. Some months later, on July 19, 1976, she slipped again at work on her way to the lavatory. The resultant twist to her right knee was so severe that ultimately it was followed by a total knee replacement. Ms. Avina sustained another knife cut on July 28, 1977, this time to her right inner arm.

In late 1978 or early 1979, Ms. Avina's right knee was totally replaced in surgery by Dr. Stephen D. Storey. Shortly thereafter, in early July, 1979, she fell yet again while shopping at a supermarket, seriously injuring her low back.

Included among the doctors' reports which came to his attention, Mr. Muth found a detailed and very recent letter from Dr. H. Phillip Dohn. (D. Exh. E.) This letter, dated March 5, 1979, not only confirmed Mr. Muth's conclusion that Ms. Avina's physical impairments placed her in Category G of the Rating Plateau Guidelines For Work Capacity, but that there were serious physical limitations which he had to consider with regard to her ability to safely continue work at Dalgety. Dr. Dohn also went into detail about Ms. Avina's physical disabilities:

> When questioned, the patient states she has definite difficulty in the use of the right wrist and hand, complaining of awkwardness on fine motions and a definite and major loss of strength and grasp.
>
> The patient also states that she has some persistent low grade discomfort in the right knee which at times becomes rather definitely painful if she walks a lot. She

> states if she walks on uneven ground she will have a definite aggravation. The patient states the pain will radiate up into the mid-thigh and will radiate down into the mid-calf region.

Dr. Dohn measured the range of knee motions and discovered that Ms. Avina's right knee could flex only over 85%, while her left knee could flex over 135%. Moreover, "[t]he patient shows definite evidence of 7 or 8% of a medical lateral instability in the right knee." The doctor continued, stating that "[s]tudies of the right knee show definite evidence of markedly advanced degenerative arthritic changes of the joint."

Dr. Dohn's examination showed that Avina's right wrist, as well, was seriously impaired:

> Evaluation of the right wrist shows definite evidence of a moderate Silver fork deformity of the wrist. The patient at rest holds the wrist in the radial deviated position by about 15% on the right.

Furthermore, Ms. Avina's right wrist had an extension of only 65 degrees, as compared to 7 degrees for the left, and a flexion of only 45 degrees, as compared to 75 degrees for the left. The left wrist could describe an Ulnar deviation of 30 degrees, but the right could describe only trace Ulnar deviation. Similarly, the grasp in her right hand was markedly inferior to that in her left:

> Grasp with two Jamar Type dynamometers used simultaneously produces the following readings:
>
> | | | | | |
> |---|---|---|---|---|
> | Right: | 5 | 5 | 3 | kgm |
> | Left: | 14 | 12 | 10 | kgm |

All told, Mr. Muth examined at least five doctors' reports. He also learned, from a report by Dr. Storey on Ms. Avina's condition after her most recent fall in July of 1979, that she had congenital low back deformity." Mr. Muth took particular note of that, and on August 8, 1979, the Employer,

by Mrs. Bess Shimmon, Dalgety's nurse, contacted Dr. Storey to investigate Ms. Avina's ability to do particular aspects of her job as briefly described in Mrs. Shimmon's letter. (D. Exh. C.) Dr. Storey promptly replied that "reaching at arm's length across a waist-high conveyor belt would not only be dangerous for her, but possibly impossible for her." The doctor added: "cold environments would probably aggravate her problem so she should probably not work in a cold and drafty environment." (D. Exh. D.)

The actual job, of course, was substantially more difficult and strenuous than a brief description could convey. Thus, the Employer gave little weight to a subsequent printed form from Dr. Storey's office, dated September 6, 1979, that released Ms. Avina for work with "no restrictions", inasmuch as Dr. Storey could have relied only on the brief job description in Mrs. Shimmon's letter and the representations of the Applicant herself as to the difficulty or requirements of her job.

Indeed, Dr. Storey admitted as much after he had become familiar with the nature of the jobs for which Ms. Avina would be responsible. At the trial, he stated that, after becoming more familiar with those jobs, he felt Ms. Avina would have been unable to perform her jobs at Dalgety at the time of her discharge for longer than 10 days or 2 weeks. Especially in view of the numerous repetitive motions she would be called upon to perform, the Dalgety jobs would result in severe disabling symptoms within that time, rendering Ms. Avina unable to work. Of course, the onset of such symptoms would create an extremely high risk of accidents, given the working conditions at the plant.

The Employer presented extensive evidence identifying numerous examples of potential hazards to the safety of Ms. Avina and her fellow employees. For example, Ms. Avina would repeatedly have to climb stairs to get to the carrot

area or the broccoli line. The wet surface of the wooden stairs is slippery and could constitute a hazard for an employee with Ms. Avina's condition. Since the employees tend to go up and down the stairs in groups, if one employee fell she could easily take several others with her. Similarly, given that there is a great deal of water on the floors in the plant, the risk of falling for an employee with Ms. Avina's condition is especially high. The employees tend to work in close physical proximity with each other, and if, for example, one fell onto a belt, other employees might easily be injured. If such an accident occurred on the broccoli trimming line, where the employees must wield sharp knives, such a fall could prove disastrous. Ms. Avina had apparently already cut herself in this fashion.

Mr. Muth testified more extensively about the safety hazards especially dangerous for an employee in Ms. Avina's condition. He was most concerned, he explained, about her falling — especially because Ms. Avina's accident record showed an extremely high proportion of injuries that resulted from falling and her replaced knee rendered her relatively unstable on her feet. In addition, falling in certain areas could result in special problems. Ms. Avina could become entangled in a piece of equipment, like the carrot saw.

After weighing all the evidence that his thorough investigation had produced, Mr. Muth concluded that Ms. Avina's continued employment at Dalgety presented an unacceptably high risk of injury to herself or her fellow workers. Accordingly, he was left with no choice but to terminate her.

Ms. Avina and her collective bargaining representative, Teamsters Local Union No. 890, grieved the discharge. The grievance was processed through the steps provided for in the collective bargaining agreement and ultimately was submitted for decision to an impartial arbitrator. The arbitrator

held a full day's hearing, on October 26, 1979, in which the parties had a full and fair opportunity to present their cases. Extensive evidence was introduced; indeed, the evidence presented at the arbitration hearing coincides almost precisely with that presented at the Section 132a trial herein. After considering that evidence, the arbitrator ruled that the discharge did not violate the collective bargaining agreement.

In his Decision and Award, received in evidence by Judge Butler (D. Exh. G.), the arbitrator elucidated the reasons for his finding. He expressly made factual determinations both on the true reason for the discharge and on Ms. Avina's ability to continue working.

With respect to the reason for the discharge, the arbitrator acknowledged the extensive investigation undertaken by the Employer. He expressly ruled that Dalgety discharged Ms. Avina in the genuine and good-faith belief that her continued employment presented an unacceptably high risk of injury to both Ms. Avina herself and her co-workers.

In addition, the arbitrator discussed Ms. Avina's medical condition at length and expressly determined that, in fact, the Employer was quite correct to believe that Ms. Avina could not continue to work safely. Excerpts from his Decision and Award serve to show that the arbitrator specifically dealt with this issue:

> [There is] a strong possibility of future injuries unless Ms. Avina conducts herself very, very carefully and does not get involved in a hazardous environment. . . .
>
> Ms. Avina's arthritic condition can only, by any standard of measurement, be expected to progressively deteriorate. . . .
>
> The back condition will probably not get better and has high possibilities of getting worse, especially if she should suffer another fall. No improvement can be reasonably anticipated insofar as her wrist is concerned

> and, with the presence of arthritis, one can assume that it is degenerative. In the case of her prosthetic knee, it would seem reasonable to conclude that she will have ever-increasing difficulty in spending a full work shift standing before a belt or a table, and indulging in motions that exercise her arm and back, causing constant shifts in the weight on her legs and feet. The wet environment and the necessity to use stairs, occasionally or frequently, presents a real impediment to her well being.

(D. Exh. G at 7-8.)

In short, the arbitrator expressly agreed with the Employer's judgment that continuing to employ Ms. Avina would present an unacceptably high risk of injury to herself or her fellow workers.

No party to the arbitration attempted court action to modify or set aside the arbitration award or the arbitrator's factual determinations.

On February 5, 1981, Judge Butler presided over the trial of Ms. Avina's claim that the Employer's action in discharging her discriminated against her in violation of Labor Code Section 132a. Both parties presented evidence virtually identical with that which they presented at the arbitration hearing. The parties were not permitted to brief their positions. Judge Butler issued a decision on March 3, 1981, in which he found that, although the Employer had discharged Ms. Avina because of its genuine and good-faith belief that her continued employment would present an unacceptable risk of future injury, the discharge nonetheless violated Section 132a.

III

ARGUMENT

A. GIVEN JUDGE BUTLER'S FACTUAL DETERMINATIONS AS A MATTER OF LAW NO VIOLATION OF SECTION 132a CAN HAVE OCCURRED

Judge Butler's decision contains essentially two pivotal determinations of fact. First, Mr. Muth terminated Ms. Avina's employment solely because of his good-faith belief that her continued employment would present an unacceptably high risk of injury to herself or to her co-workers. Second, Mr. Muth's belief was shown by subsequent events to have been incorrect, inasmuch as Ms. Avina did work elsewhere after her discharge. To these factual determinations, Judge Butler applied the case of *Western Electric Company v. WCAB*, 99 C.A. 3d 629 (1979), and concluded that that case left him no option but to find a violation of Section 132a.

Judge Butler's decision, therefore, stands or falls on his interpretation of *Western Electric*.[1] We submit that his interpretation is incorrect.

Western Electric did involve facts very similar to those in the instant case. An employee had suffered an industrial injury that resulted in a certain degree of permanent disability. After reviewing the medical evidence and the nature of the available jobs, the employer discharged the employee on the professed ground that her continued employment would present an unduly high risk of further injury. The employee charged that this reason was a mere pretext and that she was really discharged because she had applied for

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[1]In the Judge's own words, he is "of the opinion that there is direct controlling authority, binding on [him] and compelling this decision when the facts as [he] understand[s] them exist." Opinion on Decision, Slip Op. at 1.

workers' compensation benefits.

The Workers' Compensation Judge ruled that the employer had not violated Section 132a. On reconsideration, the WCAB reversed. The Board "was of the opinion that neither medical evidence nor the eventual appeals board disability rating indicated [the employee] was unable to do her job" and that, therefore, " '[the employer's] refusal to allow [the employee] to return to work was unwarranted.' " 99 C.A. 3d at 637. In other words, the WCAB felt that no real risk of injury existed. Thus, the WCAB in the *Western Electric* case did take the position advanced by Judge Butler in the instant case; namely, that an employer violates Section 132a if the employee actually could do the work the employer claimed she could not perform without undue risk of injury.[2]

But the Court of Appeal *reversed* the Board. The Court of Appeal held that no violation of Section 132a could be found unless the employer's asserted reason for discharging the employee — the risk of further injury — was a mere pretext, concealing a retaliatory or discriminatory motive. Analyzing the seminal case of *Judson Steel Corp. v. WCAB*, 22 C. 3d 658 (1978), the *Western Electric* Court explained that "*Judson Steel* establishes that Section 132a prohibits the employer from *arbitrarily* taking action against his employee on the *sole* basis that the employee sustained an industrial injury." 99 C.A. 3d at 644 (emphasis added).

Where the *true reason* for the discharge was not arbitrary or related to workers' compensation proceedings, however, no violation of Section 132a can have occurred:

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[2]The Board in *Western Electric* also credited the employee's testimony that the employer had indicated her workers' compensation case was the reason for the discharge. 99 C.A. 3d at 637.

> Western asserts it discharged Smith as there was no work available which she could perform without the risk of either reinjury or further injury. *If this is the true reason Western refused to allow Smith to return to work, then there was no section 132a violation.*

Id. at 644-45 (emphasis added).

Under *Western Electric*, therefore, the WCAB's inquiry must stop once it has determined the "true reason" for the discharge. Section 132a is violated only if the "true reason" was to penalize the employee for participating in workers' compensation proceedings or sustaining an industrial injury.

The Court of Appeal recognized, however, that this inquiry into the "true reason" for a discharge might well involve difficult problems of proof. A discharged employee would have trouble proving that her employer's "true reason" was to retaliate against her for her resort to workers' compensation proceedings if the employer steadfastly maintained that his "true reason" was to protect against what he saw as an undue risk of further injury.

The solution, the *Western Electric* Court decided, was to utilize a shifting burden of proof. If the employee could show that, regardless of what the employer professed to believe, there really was no undue risk of injury, it would be presumed that the employer's "true reason" for the discharge was to punish the employee for participating in workers' compensation proceedings or sustaining an industrial injury. The burden of proof would then shift to the employer to demonstrate that his "true reason" really was to avoid further injury.

If the employer could not carry this burden — if he could not convince the Board that, although he may have been mistaken, he had *genuinely believed* that the employee's continued employment presented an undue risk of further injury — then the Board would find that he had violated

Section 132a. But, if the employer *could* demonstrate to the Board's satisfaction that his "true reason" for the discharge was that he had believed in good faith that there was an unacceptable risk of injury, then the employer would succeed in carrying his burden of proof and the inference of unlawful motive would be overcome.

In other words, if the employee can demonstrate that, in fact, no risk of injury existed, the Board may draw the initial inference that the employer's professed reason for the discharge was merely pretextual and concealed a discriminatory motive. However, if the employer can present sufficient evidence to convince the Board that the "true reason" for the discharge really was his (mistaken) belief that a risk of injury existed, then the inference of unlawful motive is overcome. As the *Western Electric* Court put it:

> [I]f Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself, then the Board could properly draw an inference of prohibited discriminatory action by Western *unless Western can otherwise demonstrate to the contrary*.

99 C.A. 3d at 645 (emphasis added).[3] Accordingly, the *Western Electric* Court annulled the WCAB's finding of a violation of Section 132a.

The instant case presents the same issue. Just as in *Western Electric*, Dalgety professed that its reason for discharging Ms. Avina was that Mr. Muth genuinely believed her continued employment would create an unacceptably high risk of injury to herself or her co-workers. Just as in *Western*

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[3]The *Western Electric* Court supported this proposition by citing to that part of *Judson Steel* wherein the California Supreme Court found the employer's professed reason to be "specious" — in other words, where the employer simply could not convince the Court that its professed reason was its "true reason". 22 C. 3d at 665.

Electric, the Applicant claimed that reason was a mere pretext and that the true reason was that she had been involved in workers' compensation proceedings. Similarly, Ms. Avina demonstrated to Judge Butler's satisfaction that she was capable of continuing her employment with Dalgety without presenting a risk of further injury.

At that point, under the Western *Electric* rule, the burden of proof shifted to Dalgety to show that its "true reason" *really* was Mr. Muth's concern for the risk of injury.

At the trial, Dalgety presented extensive evidence on this point. It outlined the many steps taken by Mr. Muth during the nearly two months that he investigated the extent of Ms. Avina's physical impairment, the nature of the jobs she would have to be able to perform, and the safety hazards present in the plant. The record before Judge Butler contained much testimony and other evidence consistently demonstrating that Mr. Muth discharged Ms. Avina for the sole reason that he believed in good faith that her continued employment presented an unacceptably high risk of further injury. No contrary evidence was introduced.

Judge Butler was convinced:[4]

> The reason for the discharge, as testified to by Brian Muth, is that "there was no work available which she could perform without the risk of either re-injury o[r] further injury."
>
> He (Muth) came to this conclusion because of (a) the degree of disability contemplated by the amount of the compromise, (b) the opinions of Drs. Dohn and Story regarding the degree of handicap, ([c]) the analysis of the work environment and tasks and, (d) the history of

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[4]No doubt the Judge had in mind the familiar rule of *Lamb v. WCAB*, 11 C. 3d 274 (1974), that, "[a]s a general rule, the board *'must accept as true the intended meaning of [evidence] both uncontradicted and unimpeached.'* " *Id.* at 281 (emphasis added).

several other industrial injuries.[5]

* * *

Mr. Muth's motives are accepted by me as true, and genuinely considerate of Ms. Avinas' [sic] condition.

Opinion on Decision, Slip Op. at 1-2 (emphasis added).

In short, Judge Butler expressly determined that, as a factual matter, the "true reason" for the discharge was Mr. Muth's concern for the risk of injury. *Western Electric* holds that, in these circumstances, no violation of Section 132a has occurred:

> [The Employer] asserts it discharged [the employee] as there was no work available which she could perform without the risk of either reinjury or further injury. *If this is the true reason [the employer] refused to allow [the employee] to return to work, then there was no Section 132a violation.*

99 C.A. 3d at 644-45 (emphasis added). Because Judge Butler himself held that this was indeed the "true reason" for the discharge, there was no Section 132a violation.

Why, then, did Judge Butler ultimately find that Dalgety had violated Section 132a? The answer lies in his view of the applicable law, as reflected in his Opinion: "Labor Code 132(a) does not require a bad motive." Opinion on Decision, Slip Op. at 2. This is plainly wrong.

Judge Butler's error is easy to trace. He based his conclusion on the language in *Western Electric* which, as dis-

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[5]The Employer takes exception to Judge Butler's characterization of the record to the extent that it indicates that Mr. Muth considered Ms. Avina's history of industrial, but not non-industrial, injuries. Uncontroverted and unimpeached testimony established that Mr. Muth was concerned with Ms. Avina's entire medical condition and with all of her prior injuries, regardless of whether they were industrial or non-industrial. In fact, Mr. Muth specifically testified that he did not treat or consider the two types of injuries in different ways and that he was concerned only with evaluating her medical condition and the extent of her physical impairment, regardless of the causes of her difficulties.

cussed above, sets forth the rule for *shifting the burden of proof* on the motive issue to an employer where the employee had demonstrated the ability to perform the job without risk of injury. Judge Butler erroneously assumed that, once the employee so demonstrated, a Section 132a violation had been made out. As discussed above, however, *Western Electric* simply holds that, once the employee has shown that there was no risk of injury, a *rebuttable inference* arises that the employer's "true reason" for the discharge was linked to the employee's participation in workers' compensation proceedings. To avoid a finding of violation of Section 132a, the employer must rebut that inference by convincing the Board that the "true reason" for the discharge really was his good-faith belief that a risk or injury existed.

In the instant case, the Employer *succeeded* in rebutting the inference of bad motive. Judge Butler himself found that the "true reason" for the discharge was Mr. Muth's concern about injuries. Having established that the "true reason" was not unlawful, therefore, Judge Butler was required by *Western Electric* to hold that no violation had occurred.

Moreover, Judge Butler's view — that Section 132a "does not require a bad motive" — is inconsistent not only with the *Western Electric* case but also with *Judson Steel* and its progeny. In *Judson Steel*, unlike *Western Electric* and the instant case, the employer did *not* believe that the laid-off employee's continued employment would present a risk of injury. 22 C. 3d at 667. The "true reason", or motive, for the layoff was to punish the employee on account of his having sustained an industrial injury. The Supreme Court *expressly excluded from Section 132a's scope* the situation where an employer *genuinely believed* that the discharge was necessary to avoid injury — *regardless of whether that*

belief was correct:

> [T]hose situations in which an employee is penalized solely because he was injured on the job or had to lose time from work solely because of a work injury (*rather than for example, situations in which the employer reasonably believes that the employee's injury prevents him from being able to do his job in an appropriate manner*) are within the scope of Labor Code Section 132[a].

Id. at 666-67 (emphasis added). *Cf. Burton v. WCAB*, 112 C.A. 3d 85, 88 (1980) (" '[S]ection 132a prohibits the employer from *arbitrarily* taking action against his employee on the *sole* basis that the employee sustained an industrial injury' " (emphasis added)).

Thus, the California Supreme Court has ruled that actual motive — what the employer genuinely believed — is the central consideration in determining whether Section 132a has been violated. This Board must abide by that rule in this case, just as it has in the past. *E.G., Armstrong v. WCAB*, 45 C.C.C. 1235, 1236 (1980), writ denied December 23, 1980 (no violation of Section 132a expressly because "the termination was not *motivated* by compensation considerations but related to unsatisfactory job performance" (emphasis added)); *cf. Jones v. WCAB*, 42 C.C.C. 842 (1977), writ denied October 17, 1977 (no Section 132a violation where true reason for discharge was employer's genuine belief that employee was guilty of excessive absenteeism; reflects no inquiry into whether employee was in fact excessively absent).

It is no accident that the Courts and the Board unanimously hold a bad motive to be a necessary element of a Section 132a violation. Judge Butler's view of the law would expand Section 132a into a general remedy for all employees who are disgruntled with the treatment they receive from

their employers, *regardless of reason.*

Suppose, hypothetically, that an employee who has sustained an industrial injury is suspected of theft. He protests his innocence, but the employer genuinely believes him guilty and terminates his employment. The employee files a claim under Section 132a, alleging that the theft charge was a mere pretext concealing punishment for resort to workers' compensation proceedings. At the Section 132a hearing, the employee proves to the satisfaction of the judge that he really is innocent. The judge also believes that the employer genuinely believed the employee guilty, discharged him for that reason alone, and had no thought whatsoever of penalizing him for sustaining an industrial injury or participating in workers' compensation proceedings.

What result? The hypothetical precisely parallels the facts in the instant case as seen by Judge Butler; the only difference is that the "true reason" for the discharge in the hypothetical is the employer's genuine belief that the employee committed theft, whereas in the instant case it is Mr. Muth's genuine belief that Ms. Avina's continued employment would present an unacceptably high risk of injury. Under Judge Butler's view of *Western Electric*, therefore, the hypothetical employer must be held to have violated Section 132a!

Similar hypotheticals can be generated involving *any* reason on which employers acting in good faith base discharges or other discipline. Under Judge Butler's view of the law, employees who were discharged by employers who believed in good faith that they were guilty of absenteeism, insubordination, poor performance, negligence, or a host of other failings would nevertheless be entitled to reinstatement, back pay, and a 50% penalty if they had ever had an industrial injury and could convince the judge in a Section 132a hearing that they actually were *not* guilty of improper

conduct.

In short, *Judge Butler's view of the law would make the WCAB a place to which every employee in the State of California who has ever had an industrial accident could appeal each and every adverse employment decision made by every employer, regardless of reason.* To state the proposition is to refute it. Section 132a makes no sense at all unless it requires an improper motive to be violated.

Under *Judson Steel, Western Electric*, this Board's own cases, and common sense, therefore, Section 132a is violated only if the employer's "true reason" for the discharge was unlawful. In the instant case, Judge Butler himself determined that Dalgety's "true reason" for terminating Ms. Avina was not only lawful, but laudable.[6] This Board, therefore, must hold that no violation of Section 132a occurred.

B. IN ANY EVENT, THE EVIDENCE DOES NOT SUPPORT JUDGE BUTLER'S DETERMINATION THAT THE APPLICANT WAS CAPABLE OF PERFORMING HER JOB WITHOUT CREATING AN UNDUE RISK OF INJURY

Even under Judge Butler's view of the law, no violation of Section 132a can have occurred unless Ms. Avina could demonstrate that Mr. Muth was incorrect to determine that her continued employment presented an unacceptably high risk of injury to herself or her co-workers. Judge Butler felt she successfully demonstrated that fact, based upon Ms. Avina's testimony that she had worked for a period of time at another employer's facility. In the Judge's words, she "demonstrated by the fact of her return to work for several

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[6]In his Opinion on Decision, Judge Butler declared that "Mr. Muth's motives are accepted by me as true, and genuinely considerate of Ms. Avina's condition." Slip Op. at 2.

months that she was capable of performing her work."[7] Opinion on Decision, Slip Op. at 1.

For four distinct reasons, however, the Applicant's "return to work" does not demonstrate that Mr. Muth was incorrect to believe that there was an undue risk of injury. First, under Judge Butler's own view of the law, the proper inquiry is whether "she could have returned to work without *risk* of re-injury or further injury to herself [or others]." Opinion on Decision, Slip Op. at 1 (quoting *Western Electric, supra*) (emphasis added). Merely because the risk is not realized in a particular case does not mean that it did not exist; merely because Ms. Avina may have demonstrated that she did not in fact injure herself or others at her new job does not mean that there was not an unacceptably high risk that she would. The evidence conclusively demonstrates that the risk existed at the time the termination decision was made. Subsequent events are irrelevant.

Second, Judge Butler placed undue emphasis on his determination that continued employment did not worsen Ms. Avina's medical condition, instead of looking to the likelihood of disabling symptoms. As Mr. Muth repeatedly testified, he was mainly concerned with the risk of accidents, particularly falls. That is why he was concerned more with "prognostication of an expected inability to perform certain tasks" than with "a restriction imposed by medical advice, to refrain from those same tasks in order to prevent further harm". Opinion on Decision, Slip Op. at 2. If, as he rea-

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[7]To the extent that the phrase "return to work" implies that Ms. Avina returned to work at Dalgety, the Employer takes exception to the statement on the ground that it does not accurately reflect the testimony.

sonably expected and Dr. Storey predicted,[8] continued employment would result in severely disabling symptoms, the likelihood of accidents would greatly increase. And, indeed, Ms. Avina had only worked at her new employer's for a short while before she had an accident. Thus, it is irrelevant to the proper inquiry in this case that Ms. Avina's subsequent employment did not worsen her medical condition, apart from symptoms. The high probability that disabling symptoms would develop, and that such symptoms would result in an accident such as a fall or a slip with a knife, established that an undue risk of injury existed.

Third, Judge Butler improperly relied on events that occurred long after Ms. Avina's last day at Dalgety. The only relevant issue was whether, *at the time the termination decision was made by Mr. Muth*, Ms. Avina was able to perform her job without undue risk of accident. The letter

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[8]The Employer takes exception to Judge Butler's characterization of the record, in the Summary of Evidence and at page 2 of the Slip Opinion of his Opinion on Decision, that Dr. Storey "testified that the fact of successful performance of the work for several months demonstrates he was in error at the time of rendering his earlier opinion." At the Section 132a hearing, Dr. Storey testified that he believed Ms. Avina would have been unable to return to work at Dalgety for more than 10 days or 2 weeks. In response to a hypothetical question from the bench, he testified that, if he learned that she had in fact gone right back to work at Dalgety for a substantial period and had worked without increased symptoms, his opinion would have been proven wrong. The record indicates no comment on his part about the job which Ms. Avina eventually found at another employer's, nor even knowledge that such a job had been taken. Nor did the doctor testify about whether he would feel his opinion had been proven wrong if, as actually occurred, Ms. Avina did not go to work until 8 months after the termination letter.

The Employer also takes exception to Judge Butler's characterization of the record, at page 2 of the Slip Opinion of the Opinion on Decision, that "[t]his is consistent with his later release to work without restriction." Dr. Storey did sign a form release before the termination, but the record indicates that he was not adequately acquainted with the jobs at Dalgety when he signed it. After becoming familiar with the job duties there, he opined that Ms. Avina would have been unable to work for more than 10 days or 2 weeks.

of termination was dated September 12, 1979. The period to which Judge Butler looked to evaluate Ms. Avina's job ability began in May, 1980 — some *8 months later*. It goes without saying that a lot of recuperation can occur in 8 months.[9] It was plainly unreasonable for Judge Butler to hold Mr. Muth's judgment faulty on the basis of Ms. Avina's medical condition two-thirds of a year after the fact.

Finally, in any event, Ms. Avina's performance at her new employer's could not rationally shed light on the accuracy of Mr. Muth's judgment eight months before unless her new job and the jobs at Dalgety were comparable. But, at the Section 132a trial, Judge Butler refused to allow counsel for Dalgety to pursue a line of questioning aimed at precisely that issue, despite counsel's objections.[10] Counsel was not permitted, for example, to cross-examine Ms. Avina to elicit testimony describing her new job in detail. Without such testimony, however, a comparison of her new job with those for which she was responsible at Dalgety is impossible. Accordingly, there is no record evidence suggesting that successful performance at the new job suggests the probability of successful performance at the old.

In sum, even were Judge Butler's view of the law — that Section 132a does not require an improper motive — correct, his determination that Ms. Avina was capable of performing her job at Dalgety without presenting an unacceptably high risk of injury is not supported by record evidence.

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[9]Judge Butler himself implicity acknowledged that Ms. Avina did in fact recuperate with a surprising degree of success, observing that, "had the [compensation] case been resolved by trial or stipulated rating, a Petition to Reopen and Reduce would now lie" because Ms. Avina apparently had shed much of her disability. Opinion on Decision, Slip Op. at 3.

[10]The Employer takes exception to Judge Butler's ruling on this point.

C. THE BOARD IS PREEMPTED BY FEDERAL LAW FROM GRANTING THE APPLICANT RELIEF

The Applicant and the Employer were participants in a collective bargaining relationship. While employed by Dalgety, Ms. Avina's wages and other terms of employment were governed by a collective bargaining agreement. Pursuant to that agreement, Ms. Avina and her collective bargaining representative, Teamsters Local 890, grieved the discharge which is the subject of this action. The grievance was processed through the steps of the negotiated grievance procedure, and was ultimately submitted to arbitration. The arbitrator found that (1) the Employer discharged Ms. Avina solely because it genuinely and in good faith *believed* that continuing to employ her would present an unacceptably high risk of injury to herself or others[11] and that (2) in fact, her continued employment *would* have presented such an unacceptably high risk. Accordingly, the arbitrator upheld the discharge and denied Ms. Avina the relief she sought, including reinstatement and back pay.

Now, invoking Labor Code Section 132a, the Applicant again challenges the discharge and seeks reinstatement and back pay — precisely the remedy denied her in the collective bargaining process.

Federal law preempts this Board from granting the Applicant relief. The circumstances of discharges and the procedures by which disputed discharges may be resolved are

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[11]Because Judge Butler ruled that no discriminatory or unlawful motive existed on the part of the Employer, it is unnecessary at this point to argue at length that, under state and federal law and the parties' collective bargaining agreement, no termination actually occurred until the arbitration decision confirmed the propriety of the Employer's decision not to return Ms. Avina to work and, therefore, no improper motive could be assigned to the termination because the alleged discrimination is not apparent within the four corners of the arbitration decision.

mandatory subjects of bargaining under the National Labor Relations Act, as amended (29 U.S.C. § 150 *et seq.*). *E.g.*, *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (discharge); *Alfred M. Lewis, Inc. v. NLRB*, 587 F. 2d 403 (9th Cir. 1978), *enforcing in relevant part* 229 NLRB 757 (1977) (grievance procedure); *NLRB v. Montgomery Ward & Co.*, 133 F. 2d 676 (9th Cir. 1943) (arbitration). The parties herein were also parties to the collective bargaining agreement which set forth the negotiated resolutions of those matters, psuant to which Ms. Avina pressed — and lost — her bid for reinstatement.

In these circumstances, the California Labor Code may not be applied to give to one party which she was unable to obtain through the negotiated procedures. Such an application would frustrate the parties' solution of a problem that Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal labor law precludes such a result.

Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959), is the seminal case on point. *Oliver* involved a provision of another Teamsters collective bargaining agreement which set minimum rentals to be paid when a truck owner-operator leased his truck and services to a carrier. One such owner-operator, joined by several carriers, sued in state court to enjoin the enforcement of that provision. The state court granted the injunction on the ground the challenged provision of the collective bargaining agreement violated the state antitrust law.

The United States Supreme Court reversed. It noted first that the challenged contractual provision set wages in certain situations, a mandatory subject of bargaining under the National Labor Relations Act. Application of the state antitrust law would prevent the parties from carrying out their agree-

ment on the issues arrived at through the collective bargaining process. But Congress had not affirmatively indicated that the states could limit the content of collective bargaining agreements with respect to their antitrust implications. Accordingly, the Supreme Court unequivocally held the state law preempted because:

> The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions . . . . Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the state.

358 U.S. at 296.

The instant case presents the same situation. The parties had negotiated the means by which their disputes over discharges would be resolved and the circumstances in which discharges would be proper. Pursuant to that negotiated arrangement, Ms. Avina challenged her discharge in arbitration, where she lost. In effect, the parties bargained for a resolution of the dispute and the Employer prevailed. Application of Labor Code Section 132a to grant Ms. Avina relief would invalidate the agreement reached through the collective bargaining process mandated by Congress. *Oliver* rejects such a result.

Five years after *Oliver*, the Supreme Court repeated its admonition. *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964), involved a suit in federal district court alleging, among other things, a state cause of action for damages.

The plaintiff was an employer whose facility was the site of an economic strike conducted by the union representing the employees. The strike occurred subsequent to an impasse in the contract negotiations.

In the course of the strike, the union persuaded the management of one of the employer's customers to cease doing business with the struck company. State common law prohibited the union's appeal to the customer. The trial court awarded both compensatory and punitive damages to the struck employer. The appellate court affirmed.

The Supreme Court reversed. Federal law neither protected nor prohibited the union's activity, so the Court inquired "whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation." 377 U.S. at 258. The Court found no affirmative Congressional intent to permit a state to take from the union the economic weapon it had exercised in the course of its collective bargaining relationship with the plaintiff. Accordingly, state law could not be used to *alter the results* achieved by the parties themselves in the process of collective bargaining:

> For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.

377 U.S. at 260.

In the instant case, Ms. Avina brought a state action just as in *Morton*. Precisely as in *Morton*, she seeks to use state law to obtain a result different from that which came out of the collective bargaining relationship between the parties. Just as in *Morton*, federal law preempts such an application of state law. *Accord*, *Machinists Lodge 76* and *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

In sum, where the parties to a collective bargaining relationship have agreed on a solution to a dispute over a mandatory subject of bargaining — as they did in this case by submitting the dispute over Ms. Avina's discharge to final and binding arbitration — state law *may not be used to alter the results achieved through the collective bargaining process*. Accordingly, this Board is preempted from granting Ms. Avina the relief she seeks.

D. THE DOCTRINE OF COLLATERAL ESTOPPEL REQUIRES THAT THIS BOARD FIND NO SECTION 132a VIOLATION

The parties to this action were also parties to the arbitration proceedings in which the propriety of Ms. Avina's discharge was tested under the collective bargaining agreement. At the arbitration hearing, both parties, through their respective counsel, fully and fairly litigated the circumstances of the discharge. They focused on the Employer's reason for the discharge and the issue whether Ms. Avina's continued employment would present an undue risk of injury. The evidence presented at the arbitration hearing was substantially identical to that presented at the Section 132a trial. The arbitrator expressly made factual determinations that (1) the Employer's true reason for discharging Ms. Avina was that it genuinely and in good faith *believed* that her continued employment would present an unacceptably high risk of injury to herself and her co-workers; and (2) in fact, Ms. Avina's continued employment *would* have presented such a risk.

In these circumstances, the arbitrator's factual determinations are binding on this Board — under the doctrine of collateral estoppel.[12] *Carroll v. Puritan Leasing Co.*, 77

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[12]The Employer also contends that the arbitrator's decision constitutes res judicata as to Ms. Avina's claim under Section 132a.

C.A. 3d 481, 491-93 (1978); *Tevis v. Biegel*, 156 C.A. 2d 8 (1957); 4 Witkin, California Procedure (Judgment) § 197 *et seq.* (2d ed. & Supp. 1979).

IV

CONCLUSION

Judge Butler properly found that the Employer's true reason for discharging Ms. Avina was to avoid what it genuinely and in good faith believed was an unacceptably high risk of injury to herself or her co-workers should she continue working. Given that determination, reason and precedent alike demand that the Employer be exonerated from the Applicant's charge of discrimination in violation of Section 132a.

In addition, for several distinct reasons, including the absence of record evidence supporting Judge Butler's determination that no risk of injury existed, federal preemption and collateral estoppel, Judge Butler's finding of a Section 132a violation cannot survive close inspection.[13]

WHEREFORE, the Employer requests:

1. That reconsideration be granted, that further proceedings be had, and that the Employer be exonerated from the charge of having violated Labor Code Section 132a and be granted all other appropriate relief; and

---

[13]The Employer takes exception to Judge Butler's Summary of Evidence to the extent it conflicts with the Statement of Facts herein or as specifically noted, for example in notes 7 and 8, *supra*. Moreover, the Employer takes exception to Judge Butler's failure to include in his summary the content of the exhibits in this case, particularly including the arbitration award (D. Exh. G); the arbitration transcript (App. Exh. 6); the motion analysis study (D. Exh. F); and the collective bargaining agreement (D. Exh. A). The Employer submits that review of the transcript of the Section 132a trial and the exhibits submitted therein is essential to the Board's review of this case. Finally, the Employer takes exception to Judge Butler's refusal to allow the Employer to submit even a limited brief in support of its position.

2. That the Board enter an order staying execution or, in the alternative, an order directing that no certified copy of the order, decision, or award be issued.

DATED: March 30, 1981.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF
& TICHY
A Professional Corporation
GEORGE J. TICHY, ESQ.
MICHAEL B. MARGOLIS, ESQ.

By /s/ Michael B. Margolis
MICHAEL B. MARGOLIS

Attorneys for Defendant
DALGETY FOODS, INC.

VERIFICATION

State of California, County of Los Angeles — ss.

I, MICHAEL B. MARGOLIS, declare:

I am the attorney of record for Defendant Dalgety Foods, Inc. in this action. Said Defendant is absent from the County of Los Angeles, California, where I have my office, and I make this verification for that reason.

I have read the above Petition for Reconsideration and Request for Stay of Execution. I am informed and believe that the matters stated therein are true, and on that ground I allege them to be true.

Executed this 30th day of March, 1981, at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Michael B. Margolis
MICHAEL B. MARGOLIS

Subscribed and sworn to before me this 30th day of March, 1981.

/s/ Susan R. Kassel
NOTARY PUBLIC — CALIFORNIA
[Seal]

PROOF OF SERVICE BY MAIL

I, LEE WARTZKI, declare that I am a resident of the United States and am employed in the City and County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action. My business address is 2049 Century Park East, Suite 1660, Los Angeles, California 90067.

On March 30, 1981, I served the within

PETITION FOR RECONSIDERATION AND REQUEST FOR STAY OF EXECUTION

on the parties involved by placing a true copy thereof in a sealed envelope with postage thereon prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Honorable William R. Butler
Workers' Compensation
Appeals Board
21 West Laurel Drive
Suite 69
Salinas, California 93901

N. Michael Rucka, Esq.
Rucka, O'Boyle & Lombardo
Attorneys at Law
245 West Laurel Drive
Salinas, California 93906

I, LEE WARTZKI, certify under penalty of perjury that the foregoing is true and correct, and that this document was executed on the 30th day of March, 1981, at Los Angeles, California.

/s/ Lee Wartzki
LEE WARTZKI

APPENDIX L.

Report and Recommendation on Petition for Reconsideration [by California Workers' Compensation judge].

Workers' Compensation Appeals Board Staff of California.

Case Nos. 76 SAL 8071, 77 SAL 9360.

Angelina Avina, vs. Dalgety Foods, Inc.

Judge: William R. Butler.

Injury: 7-76 & From 3-1-68 to 7-19-76.

Defendant, Dalgety Foods, Incorporated, by timely Petition requests reconsideration of the supplemental Finding and Award entered by me on March 3, 1981. A Stay of Execution is requested, and a transcript has been ordered.

In general, the petition accurately reflects the evidence and the issues, but is not complete in that it does not refer to the testimony of Stephen D. Storey, M.D., upon whose testimony I placed considerable weight.

Of the issues presented, the most crucial is my interpretation of the language in *Western Electric Company vs. Workers' Compensation Appeals Board, (Smith) 99 CA 3d 629 (1979)*. Absent this opinion of the Court of Appeals and my analysis of it, I would have found for the Defendant. The case is virtually indistinguishable from the case at bar.

The Court of Appeals held:

> "Western asserts it discharged Smith as there was no work available which she could perform without the risk of either re-injury of further injury. If this is the true reason Western refused to allow Smith to return to work, then there was no Section 132(a) violation . . .
>
> However, if Smith can demonstrate she could have returned to work without risk of re-injury or further

injury to herself, then the Board could properly draw an inference of prohibited discriminatory action by Western, unless Western can otherwise demonstrate to the contrary."

Grammatically, this phrase could have either of two antecedents. It could mean that the employer could demonstrate that its discharge really was based on its belief which was held in good faith, or it could mean that the employer could demonstrate that there was, in fact, an unreasonable risk of re-injury. I find the second meaning more logical in that the employer would have previously demonstrated its belief in the unacceptable risk or the problem of actual ability to return to the work would not have arisen.

I, therefore, concluded on the basis of applicants' return to work, her performance thereof, and Dr. Storey's testimony, that the work did not involve a risk of re-injury, and that while the employer believed it did at the time of discharge, the employer was erroneous in that decision, and that Ms. Avina, in fact, does not present such risk.

If counsels position is correct as to the meaning of this case, then the ability of the applicant to demonstrate after the fact of discharge, that she could perform the work, is meaningless.

With respect to the effect of the arbitration proceeding, and the assertion that res judicata applies, I believe petitioner is in error. First, the parties are not the same. The parties to an arbitration are the Union and the Employer. The employee is a beneficiary of such action but is not a party.

Secondly, the issue before the arbitrator clearly differed from that before me. The contract was violated, if at all, at the time of the discharge. No question was before the arbitrator as to the applicants right, under "Western Electric" to demonstrate after the fact, that she could do the work. The only apparent issue before the arbitrator was whether

or not Dalgety discharged her for the reasons stated, and were those reasons valid under the contract with the Union.

Thirdly, the arbitration decision is not a decision of a Court of Record.

Footnote 51 to the petition correctly characterizes Mr. Muth's testimony; however, I did not consider it significant in that the industrial injuries were a significant part of the basis of Mr. Muth's action, the discharge is not "appropriate".

At Page 24 of the petition, counsel poses a hypothetical question respecting theft. I do not have the citation before me, but recall a recent remand by the Court of Appeal to the Workers' Compensation Appeals Board requiring the Board to determine in fact the guilt or innocence of a person accused of a crime by the employer.

As to the arguments on Federal Preemption, I am of the opinion that this issue could not be resolved by me and did not rule on the matter; the issue was raised in a timely manner and is preserved.

It may be meritorious, but I believe beyond the authority of the trial level Workers' Compensation Judge.

COMMENT

I do not consider the language of Western Electric to necessarily be wise. I consider it binding. Absent that specific authority, I would have found no violation of 132(a). Given the Western Electric decision, the mandate of Labor Code 3202 for liberal construction and the rubric that if the evidence reasonably supports an inference in favor of an injured worker, that inference should be drawn. I believe the award complained of was compelled, and is supported by case law and substantial evidence in the form of Dr. Storey's opinion and the actually demonstrated work capacity.

RECOMMENDATION

I respectfully recommend that the Petition for Reconsideration be denied.

/s/ William R. Butler
WILLIAM R. BUTLER,
WORKERS' COMPENSATION JUDGE

WRB:db

DATE:

SERVED ON PARTIES BY MAIL AS
SHOWN ON THE OFFICIAL ADDRESS RECORD.

/s/ Deena L. Briggs.

BY Deena L. Briggs

Rucka, O'Boyle and Lombardo
245 W. Laurel Drive
Salinas, CA 93906

Littler, Mendelson, Fastiff & Tichy
2049 Century Park East, #1660
Los Angeles, CA 90067

APPENDIX M.

Answer to Petition for Reconsideration [by Angelina Avina] (May 26, 1981).

Before the Workers' Compensation Appeals Board of the State of California.

Angelina Avina, Applicant, vs. Spiegle Foods, Inc., et al., Defendants. Case No. 76 SAL 8071, 77 SAL 9360.

COMES NOW the applicant, ANGELINA AVINA, and by leave granting an extension of time to answer the employer's Petition for Reconsideration, hereby answers the petition and denies that: (1) by the Supplemental Findings And Award And Order, the Board acted without or in excess of its power; (2) the evidence does not justify the Findings of Fact; or (3) the Findings of Fact do not support the Supplemental Findings And Award And Order.

APPLICANT'S CONTENTIONS

1. The finding of discriminatory discharge in violation of Labor Code §132(a) is supported by substantial evidence and should therefore be affirmed.

2. The fact that the discharge may not have violated a collective bargaining agreement is not a defense to Labor Code §132(a), nor would such a fact be binding on the Board.

3. The validity of the Compensation Act, of which Labor Code §132(a) performs an integral part, is well established. The defendant's federal pre-emption argument is totally without merit.

STATEMENT OF FACTS

The fable of employer bona fides that the petitioning employer tries to pass off as a statement of fact is really nothing more than that: a fable. The fact is, Ms. Avina was

fired because she sustained an industrial injury and received a workers' compensation award and for no other reason.

There is no question that the entire process whereby Ms. Avina was fired was prompted by her receipt of a Compromise And Release. Brian Muth, the employer's workers' compensation coordinator, admitted as much:

"Q. . . . when did you first begin to investigate that issue — whether she should be retained or not?

A. Well, it—what caught my attention was the C And R passing across my desk. . . .

. . .

Q. And do you investigate — make the same kind of investigation in every workers' compensation case?

A. No. It was a matter of degree. This one seemed large, and I felt that it was worth working into. I knew at that point—I recall that I didn't know anything about the case.

Q. Okay. It was the size of the C And R—the dollar amount?

A. That's what first caught my attention."

(Deposition of Brian Muth, Page 12, Lines 4-7, 11-17)

The letter of termination sent to Ms. Avina, dated September 12, 1979, (Exhibit 2 to deposition of Robert L. Batterson) expressly states as one of the reasons for the firing that the employer "finds the burden of liability unreasonable"; in fact, the major portion of the letter is devoted to lamenting the size of the applicant's workers' compensation award. Although the letter is signed "Gil Q. Lopez/ Personnel Manager", the letter was actually drafted by Brian Muth (deposition of Gil Lopez, Page 15, Line 10)—the same management person who stated it was the size of the Compromise And Release that concerned him. Therefore, if said termination letter is accepted at face value and read

to mean what it says, there is absolutely no question that "the burden of liability", i.e., the amount received by the applicant by way of a compensation award, was one of the reasons for, Ms. Avina's termination, if not the prime reason.

Consistent with the fact that it was the receipt of a compensation award that prompted the applicant's termination, is the fact that the firing in this case was not handled through normal channels. Gilbert Lopez, the employer's personnel manager, testified that normally the discipline or termination of an employee was initiated at his level and then approved by "higher-ups"; in this case—since the termination was based upon the fact that the applicant received a compensation award—the reverse was true: the "higher-ups" dictated to Mr. Lopez that Ms. Avina was to be fired, going so far as to even dictate the termination letter for Mr. Lopez as already indicated. After testifying that there were no complaints concerning Ms. Avina's work that he could recall, Mr. Lopez pointed this out as follows:

"Q. . . . What are the mechanics of terminating someone?

A. Okay. The policy is that prior to terminating somebody or giving heavy discipline, I make contact with Bob Batterson, who is the director of human relations.

Q. Okay. And normally, the line of command is from you to Batterson, then, when you are going to terminate someone?
(No audible response.)

Q. Or suppose there is going to be some heavy discipline.

A. I do communicate with the plant manager, who is my direct supervisor.

. . .

BY MR. LOMBARO: Q. Well, in Mrs. Avina's case—in the procedures leading up to her termina-

tion, who initiated that?

A. I would say Mr. Muth.

Q. Okay. When I asked you about the mechanics of terminating someone, you indicated that you would first—before imposing any serious discipline—or 'heavy discipline' I think is the words you used—or terminating someone, you would first go to Mr. Batterson. That would be the procedure where you are the one that, feeling somebody is not performing adequately or is derelict in some way?

A. That's correct.

Q. That's not what happened in Angelina Avina's case?

A. No. I'd have to say No, because, like I say, it was pointed out to Mr. Muth and Mr. Muth and I got together.

Q. Well, is that when you and Mr. Muth got together? Is that the first notice to you that there was any problem with Angelina Avina's employment?

A. Repeat the question.

MR. LOMBARDO: Do you want to read it back?

(the record was read.)

The witness: Yes."

(Deposition of Gilbert Q. Lopez, Page 7, Line 22-Page 8, Line 6, Page 9, Line 5-26.)

There is no question—in the words of Robert L. Batterson, the employer's director of industrial relations—that Ms. Avina's compensation award "played an important role" in the decision to fire her. (deposition of Robert L. Batterson, Page 16) In contrast, the half-baked and feeble excuses put forth by the employer as the real reasons for firing the applicant really are nothing more than a fable. For example, Mr. Batterson was emphatic in stating that inability to ad-

equately perform the job was the main reason why Ms. Avina was terminated:

"Q. Now did Mr. Muth when he approached you regarding Angelina Avina—was his concern that she might be reinjured or was his concern that she couldn't perform the job?

A. Mostly that she couldn't perform the job."

(deposition of Robert L. Batterson, Page 25, Lines 23-26)

Mr. Muth, on the other hand, was not only less certain but was outright evasive:

"BY MR. LOMBARDO: Q. Did you intend by that letter—or at any point, did you indicate that you didn't feel she was able to perform the work?

(no audible response.)

Q. Was that the basis for termination or not?

A. I would like to check with my counsel on something.

MR. MARGOLIS: Okay. Just a second. Can we go off the record?

MR. LOMBARDO: Sure. (Whereupon, Mr. Tichy, Mr. Margolis, and the witness left the room, to return shortly thereafter, and the following proceedings were had:)

MR. LOMBARDO: We have had our short recess and you've had a chance to think it over.

THE WITNESS: Will you put the question to me again, please?

BY MR. LOMBARDO: Q. What I'm asking is: When you decided to terminate Angelina Avina, was any part of the basis for terminating her inability to perform her job?

A. The basis that—for the termination was the higher risk we felt she would be to herself of a future injury or aggravation, and the risk that she rep-

resented to others that worked around here."

(Deposition of Brian Muth, Page 25, Line 11-Page 26, Line 7)

Along the same line, it should be noted that the so-called "two months of careful investigation" alleged by the employer in its petition, in fact, consisted of nothing but one corporate official talking to another corporate official without any consideration being given to the applicant's ability to do her job. Mr. Muth, for example, never bothered to ask the personnel manager about Ms. Avina's work performance (deposition of Brian Muth, Page 20, Line 18-21); nor did he or anyone else discuss the situation with Ms. Avina before firing her. Batterson, the employer's director of industrial relations, confirmed in his deposition that no consideration was given to the applicant's actual work performance (deposition of Robert L. Batterson, Page 24, Line 5-10). As a matter of fact, Ms. Avina had been adequately performing her job, there had been no complaints concerning the adequacy of her job performance by any of her direct supervisors, and following her termination she eventually found similar employment at another frozen food plant performing essentially the same job to that employer's satisfaction.

The other cock-and-bull reason given by the employer for firing Ms. Avina is the contention that the medical reports indicate risk of re-injury if she were permitted to continue at her job. In fact, that was a unique and original assessment of the applicant's condition made by Brian Muth and Robert L. Batterson somewhere off in without the benefit of supporting medical opinion. When Ms. Avina returned to work following her industrial injury, it was with a full release from her treating orthopedist; and the release was given with full knowledge as to what the job entailed (see Exhibit 4 to deposition of Robert L. Batterson, a copy

of the plant nurse's letter to Dr. Storey and her handwritten note indicating that Dr. Storey had reviewed the job duties and approved Ms. Avina as able to perform them).

It is apparent that the employer was determined to fire the applicant no matter what the actual facts. For example, the employer decided to forego having the applicant examined by the company doctor with the intention of relying upon Dr. Storey's opinion, but then refused to follow that opinion when a full release was given:

"BY MR. LOMBARDO: Q. What you are looking at is a hand-written memorandum—copy of a hand-written memorandum which—looks like you prepared it; is that right?

A. That's right.

Q. And let's see. That was directed to Mr. Lopez?

A. Right.

Q. Okay. It mentions that Mrs. Avina should be re-evaluated by Dr. O'Neill before being allowed to resume work activities at Dalgety.

A. Right.

Q. Who had responsibility for following-up on that recommendation—I assume a recommendation from you is not a recommendation, but you are telling somebody to do something.

A. That was my instruction to Gil Lopez to not return—not allow Mrs. Avinia to return without the results of an exam by Dr. O'Neill.

Q. And was an exam by Dr. O'Neill ever carried out?

A. I don't think so.

Q. Why was that?

A. I think—I think I didn't at that point have all the facts and later learned that Dr. Storey was the specialist and covering her care. And I think we deferred from Dr. O'Neill to Dr. Storey.

Q. Okay. But isn't it true that Dr. Storey had given her a full release?
A. It is true, yes.
Q. Okay. Well you apparently didn't rely on that—
A. No, we didn't.
Q. Since you fired her.
A. That's correct. We did not rely on that."

(Deposition of Brian Muth, Page 16, Line 13-Page 17, line 14)

Mr. Muth alluded to other medical reports as possibly supporting his decision to fire Ms. Avina, and specifically mentioned Dr. Dohn's for one, but admitted that Dr. Storey—the treating orthopedist that had given Ms. Avina a release to return to work—was the only physician who was actually given a detailed job description:

"Q. . . . So the best of your recollection is that the only doctor who was actually given a job description was Dr. Storey?
A. I think that's correct."

(Deposition of Brian Muth, Page 30, Line 19-21)

As pointed out by the Trial Judge in his report on Petition for Reconsideration, the opinion and testimony of Dr. Storey is persuasive on the question of the applicant's ability to perform her job. It is clear that the employer's decision to fire Ms. Avin flew in the face of the best medical evidence that the employer had, and belies the employer's contentions that their decision was supported by medical fact.

The only explanation consistent with the employer's conduct is that Brian Muth had already made up his mind to fire Ms. Avina the minute he learned of her Compromise And Release no matter what the actual facts concerning her ability to perform her job. This is apparent from the way the employer treated Dr. Storey's opinion; the plant nurse sent a letter to Dr. Storey (Exhibit 4 to deposition of Robert

L. Batterson) to clarify whether Ms. Avina had been released to perform her regular job, and when Dr. Storey responded that she had, the employer went ahead and fired her anyway. The same prejudice and discriminatory motive is revealed by the fact that none of the individuals involved in the decision to terminate the applicant ever made any effort to observe her working to determine whether she was adequately performing her job, or even made any inquiries of any of her direct supervisors. In fact, the employer did not even go so far as to determine whether Ms. Avina's job was within or without the employer's own alleged preconceived notion of the degree of her disability:

"Q. . . . Did you make any type of investigation within the plant as to whether there would be work that was within her limitation?

A. Yeah, because we do require that our employees are able to do all jobs.

Q. Qkay. So the answer is, No? You didn't check to see if there was any work within her limitations?

A. No.

Q. Well—in fact, you didn't really have a clear idea as to what her limitations were, did you?

A. I—I don't recall whether I—I must have.

MR. LOMBARDO: I don't have anything further."

(Deposition of Gilbert Q. Lopez, Page 17, Lines 13-24

ARGUMENT AND AUTHORITIES

Labor Code §132(a) sets forth a broad prohibition of discrimination against employees who have sustained industrial injuries. Section 132(a) is essential to the protection of injured workers and the integrity of the Workers' Compensation Act. ***Judson Steel vs. WCAB, Maese***, (1978), 43 CCC 1205.

The validity and constitutionality of the compensation act has long been established. *Western Ind. Co. vs. Pillsbury*, (1915) 170 C 686; *Nelson vs. Metalclad Insulation Corp.*, (1975), 44 C.A.3d 474; 81 Am.Jur.2d. *Workmen's Compensation*, §10, et. seq. The power of the states to regulate and enact workers' compensation laws being well established, there is no merit to the employer's federal pre-emption argument, nor are the cases cited by defendant on point. The *Oliver* and *Morton* cases cited by the employer invovled situations in which state law was being invoked to the unfair advantage of employers in an economic struggle against unions; there is nothing in those cases to even remotely suggest that federal law prohibits the states from protecting industrially injured individuals from discrimination.

The gist of the employer's pre-emption argument—variously raised elsewhere in the petition under the labels "res judicata" and "collateral estoppel"—is that the employer's firing of Ms. Avina was not found to be violative of the collective bargaining agreement and therefore should not be found violative of Labor Code §132(a). However, the Supreme Court clearly stated in *Judson Steel* that compliance with a collective bargaining agreement is not a defense to 132(a):

> "[A]n employer may not defend a discriminatory employment practice, proscribed by §132(a), on the basis of the provisions of a collective bargaining agreement, for a union may no more bargain away its members' statutory rights against discrimination under the workers' compensation laws than it may bargain away its members' statutory rights against, for example, sexual or racial discrimination."
> *Judson Steel*, supra.

It is submitted that the protection of §132(a) was properly invoked in the present case. Substantial evidence supports

the inference that the applicant was terminated for discriminatory reasons. *Judson Steel*, supra, and *Western Electric Company vs. WCAB, Smith*, 44 CCC 1145, cited by the Trial Judge, recognized that direct evidence of a discriminatory action will be difficult for the employee to show. Rarely will an employer expressly state that it was taking discriminatory action against a worker for having sustained an industrial injury. Therefore, evidence supporting an inference of a retalitory action being taken should be sufficient proof of discrimination. The protection afforded by §132(a) should be liberally construed and interpreted in the manner that would be most consistent with the policy of granting relief to the injured worker.

The inquiry should start, as pointed out by the Court in *Judson Steel* and reiterated in *Western Electric*, with the question, does the employer's decision or action adversely affect the applicant thus operating as a penalty? Clearly, in the present case, the firing of Ms. Avina operated as a penalty against her and, in effect, discriminated against her as an injured worker.

Where it is clear that the employer's action against the employee was not, in fact, required — as here and as in *Judson Steel* and *Western Electric* — the burden shifts to the employer to then demonstrate the lack of a discriminatory motive for the firing. The employer should have the greater burden to show it had not discriminated against the employee. The discrimination prohibited by Labor Code §132(a) is closely related to the rules prohibiting discrimination under Title VII of the Civil Rights Act of 1974 (42 U.S.C. §2000(e), et. seq.). Therefore, case law under Title VII should be useful as a guide for setting out the basic test of what is necessary to prove unlawful discrimination.

McDonald Douglas Corp. vs. Green, (1973), 411 U.S. 792, is the leading Supreme Court decision with respect to

the allocation of the burden of proof in discrimination cases. The Supreme Court set forth the following test:

> "Once the claimant in a Title VII trial has set forth the initial burden under the statute, the establishing of prima facie case of discrimination, the burden then must shift to the employer to articulate some legitimate non-discriminatory reason for the respondent's rejection."

Although *McDonald Douglas* concerned a challenge to employment discrimination in hiring, the Courts have applied the basic tests to discriminatory discharge cases as well thereby establishing it as a general rule in discrimination cases, E.g., *Henry vs. Ford Motor Co.* (8th Cir. 1977) 553 F2d 46.

Following the test set forth in *Judson Steel* — did the employer's action penalize the employee? — such an inference of a prima facie case of discrimination has been shown, not just by the fact of the firing but also by the fact that it was prompted by the applicant's receipt of a workers' compensation award. In the face of this penalizing action, the employer has demonstrated no adequate reason or necessity. The employer's bald assertion that its motives were pure is certainly contradicted by the less than pur facts that:

— the applicant's receipt of a large Compromise and Release is what prompted the inquiry that led to her discharge;

— no investigation was made into whether the applicant was adequately performing her job (which she was);

— the employer refused to follow Dr. Storey's release and instead made its own independent medical assessment, which it is not qualified to do;

— contradictory reasons were given as the rationale for firing the applicant;

— the employer did not have a clear understanding of what were the applicant's actual limitations, nor was any effort made to determine whether her job was within those limitations.

Finally, the management personnel admitted that no consideration was given to Mrs. Avina's long work history with this employer or other relevant factors that one would normally expect an employer to weigh before firing an employee. It is submitted that the employer's burden was not met.

CONCLUSION

Section 132a should operate as a shield to protect the injured worker and to prevent the type of conduct that was engaged in by the employer in this case. The Trial Judge, properly under the case law, based his decision on the objective facts and not on the employer's self-serving statements as to its subjective intent.

The employer's argument that the use of an objective standard could, conceivably, result in the reinstatement under §132(a) of an employee fired for an alleged theft simply because he coincidentally also had an industrial injury, is typical of the fallacious arguments made by the employer throughout its petition. Obviously the firing of an employee because of an alleged theft would have absolutely nothing to do with the industrial injury, whereas in the present case there is no question that but for the industrial injury and compensation award the applicant would never have been fired; in fact, the employer's own words were that the compensation award "played an important role" in the decision to terminate Mrs. Avina.

It is therefore submitted that Trial Judge found the discharge of Mrs. Avina to be in violation of Labor Code §132a and his decision should accordingly be affirmed.

Respectfully submitted,
RUCKA, O'BOYLE & LOMBARDO
By /s/ N. Michael Rucka
N. MICHAEL RUCKA
ALFRED LOMBARDO
Attorneys for Applicant

Dated: this 26th day of May, 1981
at Salinas, California 93906

VERIFICATION

I, the undersigned, say:

I am one of the attorneys for ANGELINA AVINA, Applicant herein, that the foregoing document is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of May, 1981, at Salinas, California, 93906.

/s/ N. Michael Rucka
N. MICHAEL RUCKA

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

That I am now and at all times herein mentioned a citizen of the United States, over the age of eighteen years, a resident of Monterey County, California, and not a party of the within action or cause; that my business address is 245 W. Laurel Drive, Salinas, California, 93906, that I served a copy of the attached Answer to Petition for Reconsideration by placing said copy in an envelope addressed to:

Honorable William R. Butler
Workers' Compensation Appeals Board
21 W. Laurel Drive, Suite 69
Salinas, California - 93906

Michael Margolis, Esq.
Littler, Mendelson, Fastiff & Tichy
2049 Centruy Park East, Suite 1660
Los Angeles, California - 90067

which envelope was then sealed and, with postage fully prepaid thereon, was on May 26, 1981, deposited in the United States Mail at Salinas, California, 93906, that there is delivery service by United States Mail at the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of May, 1981, at Salinas, California, 93906.

/s/ Karen Manalo
KAREN MANALO

APPENDIX N.

Opinion and Order Granting Reconsideration and Decision after Reconsideration [by California Workers' Compensation Appeals Board] (May 29, 1981).

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant, vs. Spiegle Foods, Incorporated, and Mission Insurance Company, Defendants. Case No. 76 SAL 8071, 77 SAL 9360.

On March 30, 1981, defendant Dalgety Foods Incorporated petitioned for reconsideration of the Supplemental Findings, Award and Orders filed March 3, 1981, whereby it was found that it discharged applicant on September 6, 1979, in violation of Labor Code Section 132a, with the compensation otherwise recoverable increased by 50%, and that applicant is entitled to reinstatement and back pay by reason of such violation. Petitioner contends that the workers' compensation judge erred in finding a Labor Code Section 132a violation.

Labor Code Section 132a is interpreted as expressing a policy opposing all discrimination against workers having its basis in an industrial injury. (See *Judson Steel Corporation v. WCAB (Maese)* (1978), 43 CCC 1205, 1211; *Western Electric Co. v. WCAB (Smith)* (1979), 44 CCC 145; *County of Santa Barbara v. WCAB (Bouslaugh)* (1980), 45 CCC 872, 874.)

In his Report and Recommendation on Petition for Reconsideration, the workers' compensation judge noted as follows:

> "Of the issues presented, the most crucial is my interpretation of the language in [*Smith*, supra]. Absent this opinion of the Court of Appeals and my analysis of it, *I would have found for the Defendant*. The case is

virtually indistinguishable from the case at bar." (Emphasis added.)

In Smith, the Court of Appeal noted as follows:

"Western asserts it discharged Smith as there was no work available which she could perform without the risk of either re-injury or further injury. *If this is the true reason [the employer] refused to allow Smith to return to work, then there was no section 132a violation.* 'Section 132a does not compel an employer to ignore the realities of doing business by "reemploying" unqualified employees or employees for whom positions are no longer available.' [*Maese*, supra, at p. 1210.] However, if Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself, then the Board *could* properly draw an inference of prohibited discriminatory action by Western unless Western can otherwise demonstrate to the contrary. (See [*Maese*, supra, pp. 1208-1209].)"

(*Smith*, supra, at p. 1154; emphasis added.)

In his Report and Recommendation the workers' compensation judge noted the following interpretation for the above quoted portion of the *Smith* decision:

". . . It could mean that the employer could demonstrate that its discharge really was based on its belief which was held in good faith, or it could mean that the employer could demonstrate that there was, in fact, an unreasonable risk of re-injury. I find the second meaning more logical in that the employer would have previously demonstrated its belief in the unacceptable risk or the problem of actual ability to return to the work would not have arisen.

"I, therefore, concluded on the basis of applicant's return to work, her performance thereof, and Dr. Storey's testimony; that the work did not involve a risk

of re-injury, and that while *the employer believed it did at the time of discharge*, the employer was erroneous in that decision, and that Ms. Avina, in fact, does not present such risk.

"If counsel's position is correct as to the meaning of this case, then the ability of the applicant to demonstrate after the fact of discharge, that she could perform the work, is meaningless."
(Emphasis added.)

In the petition, defendant presented a different interpretation to the above-quoted portion of the *Smith* case, arguing as follows:

". . . [If] the employee can demonstrate that, in fact, no risk of injury existed, the Board may draw the initial inference that the employer's professed reason for the discharge was merely pretextual and concealed a discriminatory motive. However, if the employer can present sufficient evidence to convince the Board that the '*true reason*' for the discharge really was his (mistaken) belief that a risk of injury existed, then the inference of unlawful motive is overcome. . . ."
(Petition, p. 18; emphasis added.)

We do not agree with the workers' compensation judge's interpretation of *Smith*, and do agree with petitioner. Moreover, the record reveals that the workers' compensation judge was convinced that, in effect, the "true reason" for the discharge was the employer's belief (albeit possibly mistaken) that re-injury or further injury would result from continued work. That being the case, a Labor Code Section 132a violation should not have been found.

In his Opinion on Decision, the workers' compensation judge noted as follows:

"The reason for the discharge, as testified to by [the employer's Director of Industrial Relations,] Brian Muth, is that 'there was no work available which she

could perform without the risk of either re-injury or further injury.

"He (Muth) came to this conclusion because of (a) the degree of disability contemplated by the amount of the compromise, (b) the opinions of Drs. Dohn and Story regarding the degree of handicap, (c) the analysis of the work environment and tasks and, (d) the history of several other industrial injuries."

The workers' compensation judge further noted in his Opinion as follows:

". . . Mr. Muth's motives are accepted by me as true, and genuinely considerate of Ms. Avina's condition. . . ."

Based on our review of the record, including the foregoing, reconsideration will be granted to find that the employer did not discharge applicant in violation of Labor Code Section 132a.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration filed March 30, 1981, be, and it is hereby, GRANTED.

IT IS FURTHER ORDERED that the Supplemental Findings and Award and Order filed in the above-captioned matters on March 3, 1981, be, and it is hereby, RESCINDED, and the following Supplemental Finding and Orders SUBSTITUTED in lieu thereof as the Workers' Compensation Appeals Board's Decision After Reconsideration.

FINDING OF FACT

1. Defendant, Dalgety Foods, Incorporated, did not discharge applicant on September 6, 1979, in violation of Labor Code Section 132a.

ORDER

IT IS ORDERED that applicant's Petition for Labor Code Section 132a benefits be, and it is hereby, DENIED.

IT IS FURTHER HEREBY ORDERED that applicant take nothing by reason of her Petition for Labor Code Section 132a benefits.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Jordan R. [illegible]

I CONCUR.

/s/ C. L. Swezey

I DISSENT.

/s/ Barbara Sharon

Dated and Filed at San Francisco, California, May 29, 1981.

Service by Mail on Said Date on All Parties Listed Below at the Addresses on the Official Address Record:

Angelina Avina;
Rucka, O'Boyle & Lombardo;
Littler, Mendelson, Fastiff & Tichy;
Dalgety Foods, Inc.
/s/ David Lee

APPENDIX O.

Petition for Reconsideration [by Angelina Avina] (June 19, 1981).

Before the Workers' Compensation Appeals Board of the State of California.

Angelina Avina, Applicant, vs. Spiegle Foods, Inc., et al., Defendants. Case No.: 76 SAL 8071, 77 SAL 9360.

COMES NOW the applicant, ANGELINA AVINA, being first agrieved by the Opinion and Order Granting Reconsideration and Decision After Reconsideration herein dated May 29, 1981, hereby petitions for reconsideration therefrom on the grounds that: (1) by said Decision, the Board acted without and in excess of its power; (2) the evidence does not justify the Findings of Fact; and (3) the Findings of Fact do not support the Decision.

QUESTIONS PRESENTED

1. Where an employer fires an employee because of a "mistaken belief" that an industrial injury created a risk of reinjury, and fails to demonstrate a business necessity for the termination, is there sufficient justification for not invoking the protection of Labor Code §132(a)?

2. In determining whether an employee is entitled to the protection of Labor Code §132(a), should an objective or subjective test be used?

3. Is there sufficient "contrary evidence of considerable substantiality" to justify the Board's reversal of the Workers' Compensation Judge's finding of violation of Labor Code §132(a)?

4. Has the Board failed to resolve reasonable doubts in favor of the injured employee and apply the rule of liberal interpretation to the protection afforded by Labor Code §132(a)?

PRELIMINARY STATEMENT

In the initial Decision concerning the Labor Code §132(a) petition, the Workers' Compensation Judge stated that based on the lack of medical evidence to support the employer's contention that the work injury created an unreasonable risk of reinjury, and based on the applicant's actual demonstration of ability to do the job, the protection of §132(a) was invoked and the employer was ordered to reinstate the applicant in a job that she is unquestionably able to perform. On reconsideration, the Board stripped the applicant of that protection and vacated the Judge's Decision and Order.

Assuming arguendo that the employer's "mistaken belief" was an honest mistake, as opposed to a disguise for a retaliatory discharge, should the employer's subjective state of mind alone be sufficient grounds for not protecting an employee who has been fired because of her industrial injury and is fully capable of performing the job she was fired from?

It is submitted that the Board's Decision reversing the Trial Judge will completely emasculate §132(a), allowing a simple statement of subjective intent to override the overwhelming objective facts so that a simple statement by an employer that its motive was not discriminatory will be sufficient to justify discharging an employee for an industrial injury even where it is clear that that employee is capable of performing the job. At the very least, the employer should have to demonstrate a business necessity for the termination. For example, a small employer may not be able to keep a position open for an injured employee who is off for an extended period of time due to a work injury even though that employee may at the end of the recouperation period be capable of returning to the same job. In contrast, the employer in this case is a large corporation that did not demonstrate any business necessity for the discharge of the

applicant but only offered its "mistaken belief" that permitting the applicant to continue working following her receipt of a Compromise and Release created an unreasonable "burden of liability" (employer's letter terminating applicant).

The applicant contends that the authorities cited by the Board (*Judson Steel vs. WCAB, Maese*, 43 CCC 1205, and *Western Electric vs. WCAB, Smith*, 44 CCC 1145) do not stand for the proposition that penalizing action against an injured employee can be justified solely on the basis of the employer's subjective intent, absent a business necessity for the discriminatory action.

STATEMENT OF FACTS

There is no question that the entire process whereby Mrs. Avina was fired was prompted by her receipt of a Compromise and Release. Brian Muth, the employer's workers' compensation coordinator, admitted as much:

"Q. . . . when did you first begin to investigate that issue — whether she should be retained or not?

A. Well, it — what caught my attention was the C and R passing accross my desk . . .

Q. And do you investigate — make the same kind of investigation in every workers' compensation case?

A. No. It was a matter of degree. This one seemed large, and I felt that it was worth looking into. I knew at that point — I recall that I didn't know anything about the case.

Q. Okay. It was the size of the C and R — the dollar amount?

A. That's what first caught my attention."

(Deposition of Brian Muth, Page 12, Lines 4-7, 11-17)

The letter of termination sent to Ms. Avina, dated September 12, 1979, (Exhibit 2 to deposition of Robert L. Batterson) expressly states as one of the reasons for the firing that the employer "finds the burden of liability unreasonable"; in fact, the major portion of the letter is devoted to lamenting the size of the applicant's workers' compensation award. Although the letter is signed "Gil Q. Lopez/ Personnel Manager", the letter was actually drafted by Brian Muth (deposition of Gil Lopez, Page 15, Line 10) — the same management person who stated it was the size of the Compromise and Release that concerned him. Therefore, if said termination letter is accepted at face value and read to mean what it says, there is absolutely no question that "the burden of liability", i.e., the amount received by the applicant by way of compensation award, was one of the reasons for Mrs. Avina's termination if not the prime reason.

Consistent with the fact that it was the receipt of [illegible]pensation award that prompted the applicant' ter[illegible], is the fact that the firing in this case was not handled [illegible] normal channels. Gilbert Lopez, the employer's personnel manager, testified that normally the discipline or termination of an employee was initiated at his level and then approved by "higher-ups"; in this case — since the termination was based upon the fact that the applicant received a compensation award — the reverse was true: the "higher-ups" dictated to Mr. Lopez that Mrs. Avina was to be fired, going so far as to even dictate the termination letter for Mr. Lopez as already indicated. After testifying that there were no complaints concerning Mrs. Avina's work that he could recall, Mr. Lopez pointed this out as follows:

"Q. . . . What are the mechanics of terminating someone?

A. Okay, the policy is that prior to terminating somebody of giving heavy discipline, I make

contact with Bob Batterson, who is the director of human relations.

Q. Okay. And normally, the line of command is from you to Batterson, then, when you are going to terminate someone?

(No audible response.)

Q. Or suppose there is going to be some heavy discipline.

A. I do communicate with the plant manager, who is my direct supervisor.

BY MR. LOMBARDO: Q. Well in Mrs. Avina's case — in the procedures leading up to her termination, who initiated that?

A. I would say Mr. Muth.

Q. Okay. When I asked you about the mechanics of terminating someone, you indicated that you would first — before imposing any serious discipline — or 'heavy discipline' I think is the words you used — or terminating someone, you would first go to Mr. Batterson. That would be the procedure where you are the one that, feeling somebody is not performing adequately or is derelict in some way?

A. That's correct.

Q. That's not what happened in Angelina Avina's case?

A. No. I'd have to say No, because, like I say, it was pointed out to Mr. Muth and Mr. Muth and I got together.

Q. Well, is that when you and Mr. Muth got together? Is that the first notice to you that there was any problem with Angelina Avina's employment?

A. Repeat the question.

M. LOMBARDO: Do you want to read it back?

(the record was read.)

The witness: Yes."

(Deposition of Gilbert Q. Lopez, Page 7, Line 22-Page 8, Line 6, Page, 9, Line 5-26.)

There is no question — in the words of Robert L. Batterson, the employer's director of industrial relations — that Mrs. Avina's compensation award "played an important role" in the decision to fire her. (deposition of Robert L. Batterson, Page 16) There was less agreement as to other reasons for firing her. Mr. Batterson stated that the main reason was inability to adequately perform the job:

"Q. Now did Mr. Muth when he approached you regarding Angelina Avina — was his concern that she might be reinjured or was his concern that she couldn't perform the job?

A. Mostly that she couldn't perform the job."

(Deposition of Robert L. Batterson, Page 25, Lines 23-26)

Mr. Muth, on the other hand, gave a different reason after trying to evade an answer:

"BY MR. LOMBARDO: Q. Did you intend by that letter — or at any point, did you indicate that you didn't feel she was able to perform the work?

(no audible response.)

Q. Was that the basis for termination or not?

A. I would like to check with my counsel on something.

MR. MARGOLIS: Okay. Just a second. Can we go off the record?

MR. LOMBARDO: Sure. (Whereupon, Mr. Tichy, Mr. Margolis, and the witness left the room, to return shortly thereafter, and the following proceedings were had:)

MR. LOMBARDO: We have had our short recess and you've had a chance to think it over.

THE WITNESS: Will you put the question to me again, please?

BY MR. LOMBARDO: Q. What I'm asking is: When you decided to terminate Angelina Avina, was any part of the basis for terminating her inability to perform her job?

A. The basis that — for the termination was the higher risk we felt she would be to herself of a future injury or aggravation, and the risk that she represented to others that worked around here."

(Deposition of Brian Muth, Page 25, Line 11-Page 26, Line 7)

It should be noted that Mr. Muth never bothered to ask the personnel manager about Mrs. Avina's work performance (deposition of Brian Muth, Page 20, Line 18-21); nor did he or anyone else discuss the situation with Mrs. Avina before firing her. Batterson, the employer's director of industrial relations, confirmed in his deposition that no consideration was given to the applicant's actual work performance (deposition of Robert L. Batterson, Page 25, Line 5-10). As a matter of fact, Mrs. Avina had been adequately performing her job, there had been no complaints concerning the adequacy of her job performance by any of her direct supervisors, and following her termination she eventually found similar employment at another frozen food plant performing essentially the same job to that employer's satisfaction.

Not only is there nothing in the medical record to support the employer's contentions that Mrs. Avina's industrial injury would create an unreasonable risk of reinjury if she were allowed to continue at the same job, but the actual medical opinions relied upon by the employer were to the contrary. For example, the employer decided to forego hav-

ing the applicant examined by the company doctor with the intention of relying upon Dr. Storey's opinion, but they refused to follow that opinion when a full release was given:

"BY MR. LOMBARDO: Q. What you are looking at is a handwritten memorandum — copy of a handwritten memorandum which — looks like you prepared it; is that right?

A. That's right.

Q. And let's see. That was directed to Mr. Lopez?

A. Right.

Q. Okay. It mentions that Mrs. Avina should be re-evaluated by Dr. O'Neill before being allowed to resume work activities at Dalgety.

A. Right.

Q. Who had responsibility for following-up on that recommendation — I assume a recommendation from you is not a recommendation, but you are telling somebody to do something.

A. That was my instruction to Gil Lopez to not return — not allow Mrs. Avina to return without the results of an exam by Dr. O'Neill.

Q. And was an exam by Dr. O'Neill ever carried out?

A. I don't think so.

Q. Why was that?

A. I think — I think I didn't at that point have all the facts and later learned that Dr. Storey was the specialist and covering her care. And I think we deferred from Dr. O'Neill to Dr. Storey.

Q. Okay. But isn't it true that Dr. Storey had given her a full release?

A. It is true, yes.

Q. Okay. Well you apparently didn't rely on that —

A. No, we didn't.

Q. Since you fired her.

A. That's correct. We did not rely on that."

(Deposition of Brian Muth Page 16, Line 13-Page 17, Line 14)

Mr. Muth alluded to other medical reports as possibly supporting his decision to fire Mrs. Avina, and specifically mentioned Dr. Dohn's for one, but admitted that Dr. Storey — the treating orthopedist that had given Mrs. Avina a release to return to work — was the only physician who was actually given a detailed job description:

"Q. . . . So the best of your recollection is that the only doctor who was actually given a job description was Dr. Storey?

A. I think that's correct."

(Deposition of Brian Muth, Page 30, Line 19-21)

As pointed out by the Trial Judge in his report on Petition for Reconsideration, the opinion and testimony of Dr. Storey is persuasive on the question of the applicant's ability to perform her job. It is clear that the employer's decision to fire Mrs. Avina flew in the face of the best medical evidence that the employer had, and belies the employer's contentions that there decision was supported by medical fact.

The only explanation consistent with the employer's conduct is that Brian Muth had already made up his mind to fire Mrs. Avina the minute he learned of her Compromise and Release no matter what the actual facts concerning her ability to perform her job. This is apparent from the way the employer treated Dr. Storey's opinion; the plant nurse sent a letter to Dr. Storey (Exhibit 4 to deposition of Robert L. Batterson) to clarify whether Mrs. Avina had been released to perform her regular job, and when Dr. Storey responded that she had, the employer went ahead and fired her anyway. The same prejudice and discriminatory motive is revealed by the fact that none of the individuals involved in the decision to terminate the applicant ever made any

effort to observe her working to determine whether she was adequately performing her job, or even made any inquiries of any of her direct supervisors. In fact, the employer did not even go so far as to determine whether Mrs. Avina's job was within or without the employer's own alleged preconceived notion of the degree of her disability:

"Q. . . . Did you make any type of investigation within the plant as to whether there would be work that was within her limitation?

A. Yeah, because we do require that our employees are able to do all jobs.

Q. Okay. So the answer is, No? You didn't check to see if there was any work within her limitations?

A. No.

Q. Well — in fact, you didn't really have a clear ideas as to what her limitations were, did you?

A. I — I don't recall whether I — I must have.

MR. LOMBARDO: I don't have anything further."

(Deposition of Gilbery Q. Lopez, Page 17, Lines 13-24)

Applicant submits that the only reasonable inference to be drawn from the employer's conduct in this case is that the employer was determined to fire the applicant no matter what the actual facts. Even taking the most favorable and exculpatory view of the employer's conduct, i.e., that it was motivated by a "mistaken belief", there is nothing in the record or evidence proffered to show a business necessity for the termination of the applicant if you accept the Workers' Compensation Judge's findings, as you must since there was no evidence to the contrary, that Mrs. Avina was fully capable of physically performing the job from which she was fired.

ARGUMENT AND AUTHORITIES

Labor Code §132(a) sets forth a broad prohibition of discrimination against employees who have sustained industrial injuries. Section 132(a) is essential to the protection of injured workers and the integrity of the Workers' Compensation Act.

It is submitted that the protection of §132(a) was properly invoked in the present case. Substantial evidence supports the inference that the applicant was terminated for discriminatory reasons. *Judson Steel* and *Western Electric*, supra, recognize that direct evidence of discriminatory action will be difficult for the employee to show. Rarely will an employer expressly state that it was taking discriminatory action against a worker for having sustained an industrial injury or received an award. Therefore, evidence supporting an inference of retalitory action being taken should be sufficient proof of discrimination. The protection afforded by §132(a) should be liberally construed and interpreted in the manner that would be most consistent with the policy of granting relief to the injured worker.

The inquiry should start, as pointed out by the Court in *Judson Steel* and reiterated in *Western Electric*, with the question, does the employer's decision or action adversely affect the applicant thus operating as a penalty? Clearly, in the present case, the firing of Mrs. Avina operated as a penalty against her and, in effect, discriminated against her as an injured worker.

Where it is clear that the employer's action against the employee was not, in fact, required—as here and as in *Judson Steel* and *Western Electric*—the burden shifts to the employer to then demonstrate the lack of a discriminatory motive for the firing. The employer should have the greater burden to show it had not discriminated against the employee

on the basis of objective fact. The discrimination prohibited by Labor Code §132(a) is closely related to the rules prohibiting discrimination under Title VII of the Civil Rights Act of 1974 (42 U.S.C. §2000(e) et. seq.) The case law under Title VII applies an objective test and therefore should be useful as a guide for setting out the basic test of what is necessary to prove unlawful discrimination.

McDonald Douglas Corp. vs. Green, (1973), 411 U.S. 792, is the leading Supreme Court decision with respect to the allocation of the burden of proof in discrimination cases. The Supreme Court set forth the following test:

> "Once the claimant in a Title VII trial has set forth the initial burden under the statute, the establishing of prima facie case of discrimination, the burden then must shift to the employer to articulate some legitimate non-discriminatory reason for the respondent's rejection."

Although *McDonald Douglas* concerned a challenge to employment discrimination in hiring, the Courts have applied the basic tests to discriminatory discharge cases as well thereby establishing it as a general rule in discrimination cases, E.g., *Henry vs. Ford Motor Co.*, (8th Cir. 1977) 553 F2d 46.

Applying the objective test to the facts of this case — did the employer's action penalize the employee? — a prima facie case of discrimination has been shown, not only by the fact of the firing but also by the fact that it was prompted by the applicant's receipt of a workers' compensation award. In the face of this penalizing action, the employer has demonstrated no adequate reason or business necessity for the firing. Against the employer's statement that its subject intent was not discriminatory, must be weighed the overwhelming objective fact of penalizing discriminatory action:

— the applicant's receipt of a large Compromise and Release is what prompted the injury that led to her discharge:
— no investigation was made into whether the applicant was adequately performing her job (which she was);
— the employer refused to follow Dr. Storey's release and instead made its own independent medical assessment, which it is not qualified to do;
— contradictory reasons were given as the rationale for firing the applicant;
— the employer did not have a clear understanding of what were the applicant's actual limitations, nor was any effort made to determine whether her job was within those limitations.

Finally, the management personnel admitted that no consideration was given to Mrs. Avina's long work history with this employer or other relevant factors that one would normally expect an employer to weigh before firing an employee. It is submitted that the employer did not meet the burden of demonstrating business necessity for the penalizing action that was taken.

CONCLUSION

Section 132(a) should operate as a shield to protect the injured worker and to prevent the type of conduct that was engaged in by the employer in this case. The Trial Judge, properly under the case law, based his decision on the objective facts and not on the employer's self-serving statements as to its subjective intent.

The Board is also urged to consider where the present decision places the burden and hardships of the employer's "mistaken belief". Not on the party who made the mistake, whether honestly or otherwise, but on the injured employee who clearly is not responsible for the mistake and is least

able to afford it. If §132(a) does not protect the worker who "but for" an industrial injury would never have been fired, who is capable of performing the job, and where the employer has not shown a business necessity for the firing, §132(a) may as well be written off the books now.

It is therefore submitted that the Workers' Compensation Judge correctly found the discharge of Ms. Avina to be in violation of Labor Code §132(a), and that the record lacks contrary evidence of the "considerable substantiality" required to justify reversal of the trial judge.

Wherefore, it is respectfully requested that reconsideration be granted for the purpose of reinstating the original decision of the trial judge.

Respectfully submitted,

RUCKA, O'BOYLE & LOMBARDO

By: /s/ ALFRED LOMBARDO
ALFRED LOMBARDO

Dated this 19th day of June, 1981
at Salinas, California 93906

VERIFICATION

I, ALFRED LOMBARDO, declare:

I am one of the attorneys for applicant, ANGELINA AVINA, that the foregoing document is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of June, 1981, at Salinas, California, 93906.

/s/ ALFRED LOMBARDO
ALFRED LOMBARDO

PROOF OF SERVICE BY MAIL

I, COLLEEN L. SPLAWN, declare:

I am a citizen of the United States and a resident of the County of Monterey; I am over the age of eighteen years and not a party to the within entitled action; my business address is 245 West Laurel Drive, Salinas, California, 93906, on June 19, 1981, I served the within ANSWER TO PETITION FOR RECONSIDERATION by placing same enclosed in a sealed envelop with postage thereon fully prepaid, in the United States Mail at Salinas, California, addressed as follows:

Honorable William R. Butler
Workers' Compensation Appeals Board
21 W. Laurel Drive, Suite 69
Salinas, CA 93906

Michael Margolis, Esq.
Littler, Mendelson, Fastiff & Tichy
2049 Century Park East, Suite 1660
Los Angeles, CA 90067

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of June, 1981, at Salinas, California, 93906.

/s/ COLLEEN L. SPLAWN
COLLEEN L. SPLAWN

APPENDIX P.

Opinion and Order Denying Reconsideration [by California Workers' Compensation Appeals Board] (July 14, 1981).

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant, vs. Spiegle Foods, Incorporated and Mission Insurance Company, Defendants. Case No. 76 SAL 8071, 77 SAL 9360.

On June 19, 1981, applicant petitioned for reconsideration of the Appeals Board's Decision After Reconsideration in the above-captioned matters filed May 29, 1981, whereby it was found that dependent employer did not discharge applicant in violation of Labor Code Section 132a. Petitioner contends that such determination is in error and is not supported by substantial evidence.

Based on our review of the record, including the reasons and evidence discussed in our Opinion filed May 29, 1981, which we herewith adopt and incorporate herein, we are persuaded that reconsideration should be denied.

In our Opinion we noted as follows:

> ". . . [The] workers' compensation judge was convinced that, in effect, the 'true reason' for the discharge was the employer's belief (albeit possibly mistaken) that re-injury or further injury would result from continued work. That being the case, a Labor Code Section 132a violation should not have been found."

An employer's protestation of innocence is not a defense in an industrial injury discrimination case unless the trier of fact believes it. Here, the workers' compensation judge believed the employer.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration filed June 19, 1981, be, and it is hereby, DENIED.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Gordon R. [illegible]

[Seal]

I CONCUR.

/s/ C.L. Swezey

I DISSENT. (See Dissenting Opinion attached.)

/s/ Barbara A. Sharon

Dated and Filed at San Francisco, California, July 14, 1981.

Service by Mail on Said Date on All Parties Listed Below at the Addresses on the Official Address Record:

Angelina Avina;
Rucka, O'Boyle & Lombardo;
Littler, Mendelson, Fastiff & Tichy;
Dalgety Foods, Inc.

/s/ Brad [illegible]

DISSENTING OPINION

I dissent. I would grant reconsideration in order to affirm the workers' compensation judge's finding of discrimination dated March 3, 1981. There is no question that the employer's action adversely affected applicant's employment, or that the action was taken because of applicant's industrial injury. In light of the factual determination made by the workers' compensation judge there is also no question that the employer's action was a mistake.

The legislature and the higher courts have determined that discriminatory action by an employer against an injured employee is actionable. No provision has been made for a defense of "mistaken belief".

/s/ Barbara A. Sharon
BARBARA A. SHARON, Commissioner.

Dated and Filed at San Francisco, California, July 14, 1981.

Servie by Mail on Said Date on All Parties Listed Below at the Addresses on the Official Address Record:

Angelina Avina;
Rucka, O'Boyle & Lombardo;
Littler, Mendelson, Fastiff & Tichy;
Dalgety Foods, Inc.

/s/ Brad [illegible]
[Seal]

APPENDIX Q.

Petition for Writ of Review [by Angelina Avina].

1 Civil _____

In the Court of Appeal of the State of California, First Appellate District, Division _____

_____

Angelina Avina, Petitioner, vs. Workers' Compensation Appeal Board of the State of California; Spiegle Foods; Mission Insurance Company; State Compensation Insurance Fund; and Hartford Accident and Indemnity Company, Respondents. WCAB No. 76 SAL 8071, 77 SAL 9360.

To the Presiding Justice and Associate Justices of the Court of Appeal, State of California, First Appellate District:

Petitioner, ANGELINA AVINA, petitions this Court for a Writ of Review to inquire into and determine the lawfulness of the Order Denying Petition for Reconsideration filed in the proceeding before the Workers' Compensation Appeals Board entitled "Angelina Avina, Applicant vs. Spiegle Foods, Inc., et al., Defendants", Case Numbers 76 SAL 8071 and 77 SAL 9360, and in support of this petition alleges:

1. The petitioner was employed by respondent Dalgety Foods and its predecessor, Spiegle Foods, intermittently between 1968 and 1979 as a belt worker/sorter.

2. During the eleven years of employment, petitioner suffered a series of industrial and nonindustrial injuries. One such injury prompted her to file a workers' compensation claim. This claim ended with a Compromise and Release payment to plaintiff in July 1979.

3. In September 1979, respondent employer fired petitioner by reason of said injury.

4. Petitioner's union (Teamsters) thereupon initiated the company's grievance process. This process ended with an

arbitrator's decision that the company had not violated the collective bargaining agreement between the union and the respondent employer.

5. Petitioner also filed a timely complaint with the respondent Appeals Board, alleging that her discharge was in response to her workers' compensation case and therefore was discriminatory and in violation of California Labor Code §132(a).

6. The WCAB Judge held that petitioner's discharge was in violation of Labor Code §132(a). [Exhibit A]

7. Upon appeal by respondents, a three member Appeals Board panel, in a split decision, overturned the WCAB Judge by ruling that there had been no violation of Labor Code §132(a). [Exhibit B] That panel subsequently denied plaintiff's request of reconsideration but with a dissenting opinion. [Exhibit C] The WCAB Judge filed a report supporting petitioner. [Exhibit D]

8. Plaintiff requests the issuance of a Writ of Review on the following statutory grounds:

(1) The Appeals Board acted without or in excess of its power;

(2) The Order and Decision were unreasonable;

(3) The Order and Decision were not supported by substantial evidence;

(4) The Findings of Fact at the trial level do not support the decision reached on reconsideration.

9. The following questions are presented:

(1) Has an employer violated §132(a) of the California Labor Code when it discharges an employee following an investigation of that employee's medical history if the investigation was prompted by the employee's receipt of a $22,000 settlement in a workers' compensation action against the employer and prompted by a concern over future potential liability?

(2) Is an employer's good faith but mistaken belief that an employee's continued employment would be a danger to the work place sufficient grounds to remove the employer from the reach of California Labor Code §132(a)?

(2) Should the Court accpet the contention of an employer that it had concluded in good faith that an employee's injury had rendered her a danger to the work place even though that employee, after the injuyr, had returned to her job, performed to the employer's satisfaction, and had been released to do such work by the treating physician?

10. By reference, the accompanying Points and Authorities are made a part of the petition.

11. This petition has been filed within the statutory period of 45 days after the issuance by the respondent Board of its Order Denying Reconsideration. Petitioner believes that the question raised by this petition are questions of law and that there is no essential dispute over material facts.

12. Petitioner has no right to appeal from the action taken by the Board and has no plain, speedy, or adequate remedy other than by Writ of Review. This petition is authorized by Labor Code §5950.

13. Petitioner resides in this Appellate District and is a party beneficially interested in the proceeding. The parties interested whose rights will be affected by the petition are petitioner and the respondents named herein. They are all parties to the proceeding and all the parties who entered an appearance in the prior proceedings. The respondents, other than the Appeal Board, are the only parties whose interest in the action before the Board is adverse to that of the petitioner.

WHEREFORE, petitioner prays that:

(1) A Writ of Review issue out of this Court to the Workers' Compensation Appeals Board of the State of California, commanding it to certify fully to this Court, at a specified time and place, the records and proceedings in this case, so that they may be inquired into and the lawfulness of the action taken by the Board be determined by this Court; and

(2) The records and proceedings in this case be fully heard and considered by this Court, and that the Board's failure to award relief under §132(a) of the Labor Code be annulled, vacated, and set aside; and

(3) Other relief be granted that the Court considers proper.

Respectfully submitted,

RUCKA, O'BOYLE & LOMBARDO

By /s/ ALFRED LOMBARDO
ALFRED LOMBARDO
Attorney for Petitioner

Dated: _____

POINTS AND AUTHORITIES

I. SUMMARY OF FACTS

Petitioner was originally hired in 1968 by Spiegle Foods, Inc., the predecessor in interest to respondent Dalgety Foods, Inc. (hereafter "employer"). She continued to work seasonally at Dalgety as a conveyor belt worker and produce sorter for eleven years. Commencing in 1973, she suffered a series of industrial and nonindustrial injuries ranging from knife cuts common in such occupations to more severe injuries to her wrist and knee. The knee injury, occurring in 1976, prompted her to file a workers' compensation claim. This action ended with a Compromise and Release payment from respondent Mission Insurance Company to petitioner of $22,628.80 on July 6, 1979. Shortly thereafter, petitioner

was injured as the result of a nonindustrial fall. She was unable to work until September 7, 1979 on which date she reported for work. At that time she presented to Dalgety a medical release, signed by her physician, which authorized her to return her former employ. Dalgety nevertheless refused to rehire her and, on September 12, notified her in writing that her employment was terminated. Petitioner then sought, and eventually found, similar employment with another company while simultaneously initiating a grievance procedure against Dalgety. During the arbitration hearing which culminated that procedure, petitioner alleged that she had not been discharged "for cause", the only basis for discharge recognized as legitimate in the collective bargaining agreement between the Teamster's union and Dalgety. Dalgety maintained that it had discharged petitioner because her injuries had disabled her to such an extent that her continued employment would endanger both plaintiff herself and those co-workers who would depend upon her performance. The arbitrator ruled in favor of Dalgety.

Petitioner also filed a claim with the respondent Workers' Compensation Appeals Board (hereafter "WCAB"), alleging that her discharge was a response by Dalgety to her workers' compensation settlement and that it therefore was discriminatory and in violation of Labor Code §132(a). In support of this allegation, petitioner submitted evidence that (1) the process by which Dalgety eventually discharged her was initiated as a reaction to the size of the Compromise and Release settlement which she received; (2) Dalgety did not investigate the effect petitioner's injuries had on her job performance in reaching its decision to discharge her; and (3) Dalgety discounted completely the medical release presented by petitioner, choosing instead to rely on the independent medical assessment made by a nonmedical employee. In response, Dalgety contended that it had engaged

in a thorough investigation of petitioner's disability and had reasonably concluded that she was incapable of meeting the demands of her assigned job. Dalgety argued that its decision to discharge plaintiff was supported by medical evidence and that, even if its belief regarding petitioner's incapacity to work proved to be mistaken, it was nevertheless sincere and that such a good faith but mistaken belief immunized Dalgety from any charge that it had dismissed petitioner in violation of Labor Code §132(a). The sitting WCAB Judge ruled that petitioner's return to work following her injury, her satisfactory performance during that time, and the medical release issued by the treating physician combined to indicate that petitioner's disability was not so severe as to warrant her discharge. The Judge accepted Dalgety's belief to the contrary as genuine but ruled that such a mistaken belief, unsupported by the weight of available evidence, did not excuse Dalgety's otherwise discriminatory discharge of petitioner.

Dalgety appealed the WCAB Judge's ruling to a three-number panel of the respondent Board. The majority ruled that a discriminatory motive on the part of Dalgety was prerequisite to a finding that its discharge of petitioner was discriminatory. The majority concluded that (1) petitioner's demonstration that her continued employment would not be dangerous merely created an initial presumption that Dalgety's motive in discharging her was discriminatory and (2) Dalgety's evidence of a good faith belief that injury would result from plaitiff's continued employment was sufficient to rebutt that presumption. Petitioner's request for reconsideration was denied by the same panel. In the accompanying opinion, the dissenting Justice outlined her belief that Labor Code §132(a) prohibits all discriminatory action by an employer against an injured employee, including discrimination resulting from an employer's mistaken judgement. Petitioner now seeks relief from this Court.

II. QUESTIONS PRESENTED

(1) Has an employer violated §132(a) of the California Labor Code when it discharges an employee following an investigation on that employee's medical history if the investigation was prompted by the employee's receipt of a $22,000 settlement in a workers' compensation action against the employer and prompted by concern over future potential liability?

2. Is an employer's good faith but mistaken belief that an employee's continued employment would be a danger to the work place sufficient grounds to remove the employer from the reach of California Labor Code §132(a)?

(3) Should the Court accept the contention of an employer that it had concluded in good faith that an employee's injury had rendered her a danger to the work place even though that employee, after the injury, had returned to the job, performed to the employer's satification, and had been released to do such work by the treating physician?

III. ARGUMENT

(A) DALGETY'S INVESTIGATION OF PETITIONER'S MEDICAL HISTORY WAS A RESPONSE TO HER WORKERS' COMPENSATION SETTLEMENT AND WAS THEREFORE IN VIOLATION OF CALIFORNIA LABOR CODE §132(a).

In *Judson Steel Corp. vs. WCAB*, 22 C.3d 658 (1978), the California Supreme Court declared that Labor Code §132(a) prohibits *all* employer discrimination against an employee based upon the employee's pursuit of a workers' compensation claim against the employer. In the present case, Dalgety freely admits that it singled out petitioner for review solely in response to the size of the settlement involved in her workers' compensation case Petitioner submits

that both a Dalgety's investigation and all derivative events, including her dismissal, were therefore in violation of Labor Code §132(a).

B) SHOULD THE COURT DECIDE THAT DALGETY'S INVESTIGATION OF PETITIONER'S MEDICAL RECORD DID NOT VIOLATE §132(a), IT IS NEVERTHELESS TRUE THAT THE INVESTIGATION DID NOT REVEAL THAT PETITIONER'S DISABILITY WAS SO SEVERE AS TO RENDER HER A DANGER TO THE WORK PLACE.

After the WCAB hearing, the trier of fact found that as of the time of her dismissal petitioner was capable of returning to her previous work with Dalgety. The WCAB Judge based his finding on (1) the medical reports of Dr. Storey, petitioner's treating physician, and (2) the fact that petitioner did in fact return to similar work, both at Dalgety and elsewhere, following her industrial injury. The medical reports of Dr. Storey reflected petitioner's recuperation in that he stated in an August 8, 1979, letter to Dalgety that petitioner could not perform certain aspects of her job but latter changed his assessment and released her to do work without restrictions in early September 1979. The Judge reasonably concluded that the more recent report put Dalgety on notice that petitioner's previous medical problems had receded to a point where she was then able to return to work. He therfore held that the early reports did not justify Dalgety's refusal to accept the medical release. The Judge's factual holding that petitioner was capable of returning to work was uncontroverted by the WCAB panel which reviewed the Judge's decision and is not subject to review here absent a finding on the part of this Court that the holding was not supported by substantial evidence. [Labor Code

§5952] Petitioner respectfully submits that there was no basis for reversal of the WCAB Judge's decision on this point.

C) SINCE THE EVIDENCE AVAILABLE TO ITS INVESTIGATION INDICATED THAT PETITIONER, ALTHOUGH PARTIALLY DISABLED, WAS CAPABLE OF PERFORMING HER ASSIGNED WORK, DALGETY'S SUBSEQUENT DISMISSAL OF PETITIONER SHOULD BE PRESUMED TO BE IN VIOLATION OF §132(a).

In *Judson Steel*, supra, the California Supreme Court held that Labor Code §3202 is mandate that workers' compensation laws be liberally construed by Courts of this state applies equally to the anti-discrimination provisions of Labor Code §132(a). In *Western Electric Co. vs. WCAB, (Smith)*, 99 CA3d 629, (1979), the Court developed a test for §132(a) violations in keeping with a liberal construction of that statute. The test is summarized in *Western Electric* as follows:

> ". . .If [the discharged employee] can demonstrate she could have returned to worked and performed her job without risk of re-injury or further injury to herself, then the Board could properly draw an inference of prohibited discriminatory action by [the employer] unless [the employer] can otherwise demonstrate to the contrary."

As discussed above, the WCAB Judge decided that petitioner had demonstrated that she was able to return to work without risk of injury. Under *Western Electric*, therefore, he presumed that petitioner's dismissal was discriminatory and assigned to Dalgety the burden of demonstrating otherwise.

D) DALGETY HAS FAILED TO REBUTT THE PRESUMPTION THAT ITS DISMISSAL OF PETITIONER WAS DISCRIMINATORY.

Dalgety contended at trial that its investigation of petitioner's medical record led to a belief, on the part of the relevant decision makers, that petitioner could not perform her previous job without risk of injury to herself or others. That belief, as the WCAB Judgefound, proved to be mistaken. However, Dalgety consistently maintained that those decision makers held this belief "in good faith" and that such a good faith but mistaken belief was sufficient to rebutt the presumption that its dismissal of petitioner was discriminatory. More generally, Dalgety maintained that no dismissal of an employee could be found discriminatory as long as the employer could demonstrate that its *motive* in making the dismissal was not discriminatory. As detailed above, Labor Code §132(a) prohibits *all* discrmination against an employee grounded in a workers' compensation claim. Even were the Code not to be construed liberally, there is no room in the statutory language to carve out an exception to the effect that a dismissal is not discriminatory unless the employer acted out of revenge or in retaliation.

Dalgety cited the test of *Western Electric*, supra, as authority for its position. Petitioner argued that Dalgety had misinterpreted the language of the *Western Electric* Court. Thus, the case at trial, and on reconsideration, hinged on the interpretation of a single passage from the *Western Electric* opinion. The disputed language is as follows:

> "[The employer] asserts it discharged [the employee] as there was no work available which she could perform without the risk of either re-injury or further injury. If this is the true reason [the employer] refused to allow [the employee] to return to work, then there was no §132(a) violation. '§132(a) does not compel an em-

> ployer to ignore the realities of doing business by "re-employing" unqualified employees or employees for whom positions are no longer available.' (*Judson, Steel* supra, at Page 667 as cited in *Western*, supra, at Pages 644 and 645)."

Dalgety read into the phrase ". . .true reason. . ." the meaning "genuine belief" and its defense became an elaborate effort to demonstrate the genuiness of its belief that petitioner's continued employment would be dangerous to everyone in the work place. Dalgety cited no case more directly in support of its position. Petitioner, on the other hand, argued that Dalgety's sincerity was not at issue because the phrase ". . .true reason. . ." referred not to the employer's subjective beliefs but to an opportunity an employer was given by the Court to demonstrate that *objective* conditions were such that it had no choice but to dismiss the aggrieved employee. In support of this position, petitioner points out that the *Western Electric* Court, in the very next line of the opinion, quotes *Judson Steel*, supra, in giving examples of the kind of "true reasons" for which an employer can legitimatley consider not re-hiring an injured worker. The reasons cited there are: (1) that the employee has become disqualified for the position by reason of the injury, or (2) that the employee's position has been filled in her absence and no other positions are available. Dalgety has made no contention that any such objective condition exists in this case. Petitioner submits that, had the Court meant to recognize as legitimate a reason so radically different from those objective tests set forth in *Judson Steel* it would have done so explicitly.

Aside from the language of *Western Electric*, petitioner urges that the Court consider the repercussions of adopting subjective sincerity on the part of an employer as the standard for justifying the dismissal of an industrially injured

employee. Suppose an employer genuinely believed that any employee who brought a workers' compensation action was thereafter a danger to the work place and the employer therefore routinely discharged all such employees. Statistically speaking, such a belief might even be reasonable. Adoption of Dalgety's theory would remove such employer discrimination from the reach of Labor Code §132(a). Section 132(a) would therefore be rendered useless as an enforcer of worker rights.

E) EVEN SHOULD THE COURT ACCEPT THE PROPOSITION THAT A GOOD FAITH BUT MISTAKEN BELIEF ON DALGETY'S PART THAT PETITIONER WAS A DANGER TO THE WORK PLACE IS A DEFENSE TO A LABOR CODE §132(a) ACTION, SUCH A BELIEF SHOULD AT LEAST BE REQUIRED TO BE REASONABLE AND DALGETY'S BELIEF IS UNFOUNDED.

Even the most maliciously discriminating employer could allege a good faith belief that a recovered employee was somehow unfit for employment. Therefore should the Court decide to recognize a good faith but mistaken belief as a defense to a §132(a) action, it would seem prudent to require, at the very least, that the belief be reasonable. Petitioner contends that Dalgety's belief was unreasonable given the evidence available, as detailed above, during its investigation of her medical record. The decision makers at Dalgety, however, ignored some of this evidence and never made a reasonable effort to discover certain other pieces of evidence. Examples of the inadequacy of the investigator's performance are many: They never check petitioner's production record or discussed her performance with her immediate supervisor; [deposition of corporate director of industrial relations] they cancelled the medical examination

of petitioner by a company doctor, ostensively because they intended to rely on Dr. Storey's opinion, and then rejected the release issued by Dr. Storey [deposition of corporate safety manager]; they never sought to discover whether work was available at Dalgety for an individual in petitioner's position, as they interpreted that position [deposition of plant personnel manager]. Petitioner therefore submits (1) that no conclusion adverse to petitioner reached by Dalgety as a result of such an inadequate investigation could be deemed reasonable and (2) that a good faith but unreasonable and mistaken belief that petitioner was a danger to the work place should not be recognized as a valid defense to the §132(a) action.

CONCLUSION

Petitioner respectfully requests that this Petition for Writ of Review be granted, that the action taken by the Appeals Board be vacated, and that the matter be remanded for the provision of relief under Labor Code §132(a).

Respectfully submitted,
RUCKA, O'BOYLE & LOMBARDO
By
ALFRED LOMBARDO
Attorney for Petitioner

Dated: _____

VERIFICATION

I, ALFRED LOMBARDO, declare:

I am one of the attorneys for applicant, ANGELINA AVINA, that the foregoing document is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of August, 1981, at Salinas, California, 93906.

/s/ ALFRED LOMBARDO
ALFRED LOMBARDO

PROOF OF SERVICE BY MAIL

I, COLLEEN L. JORDAN, declare:

I am a citizen of the United States and a resident of the County of Monterey; I am over the age of eighteen years and not a party to the within entitled action; my business address is 245 West Laurel Drive, Salinas, California, 93906, on August 13, 1981, I served the within PETITION FOR WRIT OF REVIEW by placing same enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Salinas, California, addressed as follows:

Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102

I served the within PETITION FOR WRIT OF REVIEW by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Salinas, California, addressed as follows:

Workers' Compensation Appeals Board
Reconsideration Department
455 Golden Gate Avenue
San Francisco, CA 94102

Workers' Compensation Appeals Board
21 West Laurel Drive, Suite 69
Salinas, CA 93906

Michael Margolis, Esq.
2049 Century Park East
Suite 1660
Los Angeles, CA 90067

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of August, 1981, at Salinas, California, 93906.

/s/ COLLEEN L. JORDAN
COLLEEN L. JORDAN

"EXHIBIT A"

SUPPLEMENTAL FINDINGS & AWARD AND ORDER.

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant vs. Spiegle Foods, Incorporated, and Mission Insurance Company, Defendant. Case No. 76 SAL 8071, 77 SAL 9360.

The matter having been regularly submitted, WILLIAM R. BUTLER, Workers' Compensation Judge, makes his decision as follows:

FINDINGS OF FACT

1. Defendant, Dalgety Foods, Inc., did on September 6, 1979 discharge Angelina Avina in violation of Labor Code 132(a).

2. One-half of the compensation otherwise recoverable is in excess of $10,000.00 and applicant is entitled to increased compensation of $10,000.00.

3. Applicant is entitled to recover costs and expenses for the prosecution of the Petition in an amount not to exceed $250.00.

4. Applicant is entitled to reinstatement as an employee of Dalgety Foods, Inc. and to reimbursement of all wage loss and work benefits from September 6, 1979.

5. Defendant is entitled to credit against wage loss for all sums earned by Angelina Avina from any source since September 6, 1979.

6. Applicants' counsel has rendered legal services to the applicant in connection with the prosecution of this Petition of at least $2,500.00 which is allowed as a lien against the increased compensation set forth in Findings 2.

Applicants' counsel is also entitled to an additional fee of 25 percent of any amounts payable under Findings 4 and 5 and is allowed a lien in such percentage.

AWARD

AWARD is made in favor of ANGELINA AVINA and against DALGETY FOODS, INCORPORATED of increased compensation of $10,000.00 less $2,500.00 payable to Rucka, O'Boyle and Lombardo; together with reinstatement as a employee by Dalgety Foods, Inc. as set forth in Finding 4; together with reimbursement for all wage loss as defined in Finding 4 and 5 above, less 25 percent payable to Rucka, O'Boyle and Lombardo in accordance with Finding 6 above; together with reimbursement of any work benefits lost; and, of expenses and costs reimbursement for the prosecution of this petition in accordance with Finding 3.

ORDER

IT IS ORDERED THAT jurisdiction be reserved at the trial level to determine the amount of wage loss and credits thereunder pursuant to Findings 4 and 5, upon the filing of a Declaration of Readiness and supporting documentation to establish the same.

ORDER

IT IS FURTHER ORDERED that this matter be referred to the commissioners in care of the Office of the Secretary of the Workers' Compensation Appeals Board for such action as they deem necessary, inasmuch as the Petition for increased benefits has been granted, and inasmuch as the Petition for prosecution was abated pending determination of the Petition here in question; such abatement being at the request of the parties. The Petition requesting prosecution

is for criminal violation of Labor Code Section 132(a) and, therefore, referred to the Commissioners.

WRB:db

/s/ William R. Butler
WILLIAM R. BUTLER
WORKERS' COMPENSATION JUDGE

DATE: March 3 1981.

Served on All Parties by Mail on the Official Address Record.

BY: /s/ Deena L. Briggs

OPINION ON DECISION.

Case No. 76 SAL 8071, 77 SAL 9360.

Angelina Avina vs. Spiegl Foods, Inc., and Mission Insurance Company.

Judge: William R. Butler.

Injury: 7-19-76 & 3-1-68 to 7-19-76.

This Petition was of greater than ordinary factual and legal complexity and difficulty. Therefore, I have awarded extraordinarily large fees, i.e., 25 percent of the recovery.

I am of the opinion that there is direct controlling authority, binding on me and compelling this decision when the facts as I understand them exist. That authority is the holding in *Western Electric Company vs. Workers' Compensation Appeals Board*, (Lahoma Kay Smith) *99 CAL APP 3d 629; 44 CCC 1145*. The court held as follows:

"Western asserts it discharged Smith as there was no work available which she could perform without the risk of either re-injury or further injury. If this is the true reason, Western refused to allow Smith to return to work, then there was no Section 132(a) violation . . .

However, if Smith can demonstrate she could have returned to work and performed her job without risk of re-injury or further injury to herself, then the Board could properly draw an inference of prohibited discriminatory action by Western, unless Western can otherwise demonstrate to the contrary."

The reason for the discharge, as testified to by Brian Muth, is that "there was no work available which she could perform without the risk of either re-injury of further injury."

He (Muth) came to this conclusion because of (a) the degree of disability contemplated by the amount of the compromise, (b) the opinions of Drs. Dohn and Story regarding

the degree of handicap, (d) the analysis of the work environment and tasks and, (d) the history of several other industrial injuries.

Applicant demonstrated by the fact of her return to work for several months that she was capable of performing her work. After the nonwork related incident, she was released by Dr. Story without restriction. Dr. Story testified that the opinion he gave regarding the factors of disability, upon which the case was settled, was predictive of an inability to do the work without the development of severely disabling symptoms, and was not a prophylactic restriction to prevent further injury. He further testified that the fact of successful performance of the work for several months demonstrates he was in error at the time of rendering his earlier opinion.

This is consistent with his later release to work without restriction. The Defendants have not demonstrated to the contrary. I therefore draw the inference of prohibited conduct.

As to the impact of the grievance procedure and arbitration, the position of the Defendant that as to factual matters, the doctrine of collateral estoppel applies, they are correct, but as to the question of demonstration before the Board, that she could have returned to work and performed her job without risk of further injury or re-injury, that issue was not before the arbitrator. The only issue there was, was the determination of whether or not there was a violation of the collective bargaining agreement. There was found to be none.

There was no determination made of whether or not the discharge was in violation of Labor Code 132(a), nor could there be.

I would point out to the parties several matters which I believe pertinent.

Labor Code 132(a) does not require a bad motive. Mr. Muths' motives are accepted by me as true, and genuinely considerate of Ms. Avinas' condition. I also assume the genuine motives of Ross Barnett, George Wallace, Orval Faubus, and the Board of Education of Topeka, Kansas in the early school discrimination cases.

The insurance carrier should have kept Dalgety better informed. For instance, Dr. Powlans' opinion was not brought to Mr. Muths' attention, had his attention been so directed, he could have asked those questions of Dr. Story (or Dohn) which were asked of the doctor only at the hearing on the Petition, and probably averted this trial.

It is easy to sound critical of Mr. Muth, and no such criticism is intended. He has no medical, nor engineering expertise, and I certified specialist in Workers' Compensation. This field of law, like all other, has its own jargon, and the subtle but very real distinction between prognostication of an expected inability to perform certain tasks, and a restriction imposed by medical advice, to refrain from those same tasks in order to prevent further harm, could not only fail to impress him with the need to investigate what the basis of anyone not faced with immediate problems, and also cognizant that there is a difference.

Both are compensible, and equally so, so that the ramifications of the doctors opinions escaped counsel when the case was settled.

One "unjust" result here is compelled by law. The compromise cannot be now reopened; I do point out, however, that had the case been resolved by trial or stipulated rating, a Petition to Reopen and Reduce would now lie.

I also strongly recommended to Defendant Dalgety that in the future it keep its insuror well informed as to the actual return to work of its employees and the level of work they

are performing so that such facts can be brought to the attention of counsel and the physicians upon whose opinion the Board must rely, and to whom such information would be invaluable.

The contentions raised by Mr. Margolis in his letter of February 20, 1981 are met by the Western Electric case relied on by me. If he is correct as to the law, he must convince the Court of Appeal to change the Western Electric decision or to distinguish this case. His issues were raised and are preserved, but I find the Court of Appeals decision binding on me.

/s/ William R. Butler
WILLIAM R. BUTLER,
WORKERS' COMPENSATION JUDGE

WRB:db

"EXHIBIT B".

OPINION AND ORDER GRANTING
RECONSIDERATION AND
DECISION AFTER RECONSIDERATION.

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant, vs. Spiegle Foods, Incorporated, and Mission Insurance Company, Defendants. Case No. 76 SAL 8071, 77 SAL 9360.

On March 30, 1981, defendant Dalgety Foods Incorporated petitioned for reconsideration of the Supplemental Findings, Award and Orders filed March 3, 1981, whereby it was found that it discharged applicant on September 6, 1979, in violation of Labor Code Section 132a, with the compensation otherwise recoverable increased by 50%, and that applicant is entitled to reinstatement and back pay by reason of such violation. Petitioner contends that the workers' compensation judge erred in finding a Labor Code Section 132a violation.

Labor Code Section 132a is interpreted as expressing a policy opposing all discrimination against workers having its basis in an industrial injury. (See *Judson Steel Corporation v. WCAB (Maese)* (1978), 43 CCC 1205, 1211; *Western Electric Co. v. WCAB (Smith)* (1979), 44 CCC 1145; *County of Santa Barbara v. WCAB (Bouslaugh)* (1980), 45 CCC 872, 874.)

In his Report and Recommendation on Petition for Reconsideration, the workers' compensation judge noted as follows:

> "Of the issues presented, the most crucial is my interpretation of the language in [*Smith*, supra]. Absent this opinion of the Court of Appeals and my analysis of it, *I would have found for the Defendant*. The case is

virtually indistinguishable from the case at bar." (Emphasis added.)

In Smith, the Court of Appeal noted as follows:

> "Western asserts it discharged Smith as there was no work available which she could perform without the risk of either re-injury or further injury. *If this is the true reason [the employer] refused to allow Smith to return to work, then there was no section 132a violation.* 'Section 132a does not compel an employer to ignore the realities of doing business by "reemploying" unqualified employees or employees for whom positions are no longer available.' [*Maese*, supra, at p. 1210.] However, if Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself, then the Board *could* properly draw an inference of prohibited discriminatory action by Western unless Western can otherwise demonstrate to the contrary. (See [*MAese*, supra, pp. 1208-1209].)"
>
> (*Smith*, supra, at p. 1154; emphasis added.)

In his Report and Recommendation the workers' compensation judge noted the following interpretation for the above quoted portion of the *Smith* decision:

> ". . . It could mean that the employer could demonstrate that its discharge really was based on its belief which was held in good faith, or it could mean that the employer could demonstrate that there was, in fact, an unreasonable risk of re-injury. I find the second meaning more logical in that the employer would have previously demonstrated its belief in the unacceptable risk or the problem of actual ability to return to the work would not have arisen.
>
> "I, therefore, concluded on the basis of applicant's return to work, her performance thereof, and Dr. Storey's testimony, that the work did not involve a risk

of re-injury, and that while *the employer believed it did at the time of discharge*, the employer was erroneous in that decision, and that Ms. Avina, in fact, does not present such risk.

"If counsel's position is correct as to the meaning of this case, then the ability of the applicant to demonstrate after the fact of discharge, that she could perform the work, is meaningless."
(Emphasis added.)

In the petition, defendant presented a different interpretation to the above-quoted portion of the *Smith* case, arguing as follows:

". . . [If] the employee can demonstrate that, in fact, no risk of injury existed, the Board may draw the initial inference that the employer's professed reason for the discharge was merely pretextual and concealed a discriminatory motive. However, if the employer can present sufficient evidence to convince the Board that the '*true reson*' for the discharge really was his (mistaken) belief that a risk of injury existed, then the inference of unlawful motive is overcome. . . ."
(Petition, p. 18; emphasis added.)

We do not agree with the workers' compensation judge's interpretation of *Smith*, and do agree with petitioner. Moreover, the record reveals that the workers' compensation judge was convinced that, in effect, the "true reason" for the discharge was the employer's belief (albeit possibly mistaken) that re-injury or further injury would result from continued work. That being the case, a Labor Code Section 132a violation should not have been found.

In his Opinion on Decision, the workers' compensation judge noted as follows:

"The reason for the discharge, as testified to by [the employer's Director of Industrial Relations,] Brian Muth, is that 'there was no work available which she

could perform without the risk of either re-injury or further injury.'

"He (Muth) came to this conclusion because of (a) the degree of disability contemplated by the amount of the compromise, (b) the opinions of Drs. Dohn and Story regarding the degree of handicap, (c) the analysis of the work environment and tasks and, (d) the history of several other industrial injuries."

The workers' compensation judge further noted in his Opinion as follows:

". . . Mr. Muth's motives are accepted by me as true, and genuinely considerate of Ms. Avina's condition. . . ."

Based on our review of the record, including the foregoing, reconsideration will be granted to find that the employer did not discharge applicant in violation of Labor Code Section 132a.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration filed March 30, 1981, be, and it is hereby, GRANTED.

IT IS FURTHER ORDERED that the Supplemental Findings and Award and Order filed in the above-captioned matters on March 3, 1981, be, and it is hereby, RESCINDED, and the following Supplemental Finding and Orders SUBSTITUTED in lieu thereof as the Workers' Compensation Appeals Board's Decision After Reconsideration.

FINDING OF FACT

1. Defendant, Dalgety Foods, Incorporated, did not discharge applicant on September 6, 1979, in violation of Labor Code Section 132a.

ORDER

IT IS ORDERED that applicant's Petition for Labor Code Section 132a benefits be, and it is hereby, DENIED.

IT IS FURTHER HEREBY ORDERED that applicant take nothing by reason of her Petition for Labor Code Section 132a benefits.

WORKERS' COMPENSATION APPEALS BOARD
/s/ Gordon R. Gaines
[Seal]

I CONCUR.
/s/ C. L. Swezey

I DISSENT.
/s/ Barbara A. Sharon

Dated and Filed at San Francisco, California, May 29, 1981.

Service by Mail on Said Date on All Paries Listed Below at the Addresses on the Official Address Record:

Angelina Avina;
Rucka, O'Boyle & Lombardo;
Littler, Mendelson, Fastiff & Tichy;
Dalgety Foods, Inc.

/s/ David Lee

"EXHIBIT C".

OPINION AND ORDER DENYING RECONSIDERATION.

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant, vs. Spiegle Foods, Incorporated, and Mission Insurance Company, Defendants. Case No. 76 SAL 8071, 77 SAL 9360.

On June 19, 1981, applicant petitioned for reconsideration of the Appeals Board's Decision After Reconsideration in the above-captioned matters filed May 29, 1981, whereby it was found that dependent employer did not discharge applicant in violation of Labor Code Section 132a. Petitioner contends that such determination is in error and is not supported by substantial evidence.

Based on our review of the record, including the reasons and evidence discussed in our Opinion filed May 29, 1981, which we herewith adopt and incorporate herein, we are persuaded that reconsideration should be denied.

In our Opinion we noted as follows:

> ". . . [The] workers' compensation judge was convinced that, in effect, the 'true reason' for the discharge was the employer's belief (albeit possibly mistaken) that re-injury or further injury would result from continued work. That being the case, a Labor Code Section 132a violation should not have been found."

An employer's protestation of innocence is not a defense in an industrial injury discrimination case unless the trier of fact believes it. Here, the workers' compensation judge believed the employer.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration filed June 19, 1981, be, and it is hereby, DENIED.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Gordon R. Gaines

[Seal]

I CONCUR.

/s/ C. L. Swezey

I DISSENT. (See Dissenting Opinion attached.)

/s/ Barbara A. Sharon

Dated and Filed at San Francisco, California, July 14, 1981.

Service by Mail on Said Date on All Parties Listed Below at the Addresses on the Official Address Record:

Angelina Avina;

Rucka, O'Boyle & Lombardo;

Littler, Mendelson, Fastiff & Tichy;

Dalgety Foods, Inc.

/s/ Brad [illegible]

DISSENTING OPINION

I dissent. I would grant reconsideration in order to affirm the workers' compensation judge's finding of discrimination dated March 3, 1981. There is no question that the employer's action adversely affected applicant's employment, or that the action was taken because of applicant's industrial injury. In light of the factual determination made by the workers' compensation judge there is also no question that the employer's action was a mistake.

The legislature and the higher courts have determined that discriminatory action by an employer against an injured employee is actionable. No provision has been made for a defense of "mistaken belief".

/s/ Barbara A. Sharon
BARBARA A. SHARON, Commissioner.

Dated and Filed at San Francisco, California, July 15, 1981.

Service by Mail on Said Date on All Parties Listed Below at the Addresses on the Official Address Record:

Angelina Avina;
Rucka, O'Boyle & Lombardo;
Littler, Mendelson, Fastiff & Tichy;
Dalgety Foods, Inc.

/s/ Brad [illegible]

[Seal]

"EXHIBIT D".

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION.

Case Nos. 76 SAL 8071, 77 SAL 9360.

Angelina Avina vs. Dalgety Foods, Inc.

Judge: William R. Butler.

Injury: 7-76 & From 3-1-68 to 7-19-76.

Defendant, Dalgety Foods, Incorporated, by timely Petition requests reconsideration of the supplemental Finding and Award entered by me on March 3, 1981. A Stay of Execution is requested, and a transcript has been ordered.

In general, the petition accurately reflects the evidence and the issues, but is not complete in that it does not refer to the testimony of Stephen D. Storey, M.D., upon whose testimony I placed considerable weight.

Of the issues presented, the most crucial is my interpretation of the language in *Western Electric Company vs. Workers' Compensation Appeals Board, (Smith) 99 CA 3d 629 (1979)*. Absent this opinion of the Court of Appeals and my analysis of it, I would have found for the Defendant. The case is virtually indistinguishable from the case at bar.

The Court of Appeals held:

> "Western asserts it discharged Smith as there was no work available which she could perform without the risk of either re-injury or further injury. If this is the true reason Western refused to allow Smith to return to work, then there was no Section 132(a) violation
>
> . . .
>
> However, if Smith can demonstrate she could have returned to work without risk of re-injury or further injury to herself, then the Board could properly draw an inference of prohibited discriminatory action by Western, unless Western can otherwise demonstrate to

the contrary."

Grammatically, this phrase could have either of two antecedents. It could mean that the employer could demonstrate that its discharge really was based on its belief which was held in good faith, or it could mean that the employer could demonstrate that there was, in fact, an unreasonable risk of re-injury. I find the second meaning more logical in that the employer would have previously demonstrated its belief in the unacceptable risk or the problem of actual ability to return to the work would not have arisen.

I, therefore, concluded on the basis of applicants' return to work, her performance thereof, and Dr. Storey's testimony, that the work did not involve a risk of re-injury, and that while the employer believed it did at the time of discharge, the employer was erroneous in that decision, and that Ms. Avina, in fact, does not present such risk.

If counsels position is correct as to the meaning of the case, then the ability of the applicant to demonstrate after the fact of discharge, that she could perform the work, is meaningless.

With respect to the effect of the arbitration proceeding, and the assertion that res judicata applies, I believe petitioner is in error. First, the parties are not the same. The parties to an arbitration are the Union and the Employer. The employee is a beneficiary of such action but is not a party.

Secondly, the issue before the arbitrator clearly differed from that before me. The contract was violated, if at all, at the time of the discharge. No question was before the arbitrator as to the applicants right, under "Western Electric" to demonstrate after the fact, that she could do the work. The only apparent issue before the arbitrator was whether or not Dalgety discharged her for the reasons stated, and were those reasons valid under the contract with the Union.

Thirdly, the arbitration decision is not a decision of a Court of Record.

Footnote 51 to the petition correctly characterizes Mr. Muth's testimony; however, I did not consider it significant in that the industrial injuries were a significant part of the basis of Mr. Muth's action, the discharge is not "apportionable".

At Page 24 of the petition, counsel poses a hypothetical question respecting theft. I do not have the citation before me, but recall a recent remand by the Court of Appeal to the Workers' Compensation Appeals Board requiring the Board to determine in fact the guilt or innocence of a person accused of a crime by the employer.

As to the arguments on Federal Preemption, I am of the opinion that this issue could not be resolved by me and did not rule on the matter; the issue was raised in a timely manner and is preserved.

It may be meritorious, but I believe beyond the authority of the trial level Workers' Compensation Judge.

COMMENT

I do not consider the language of Western Electric to necessarily be wise. I consider it binding. Absent that specific authority, I would have found no violation of 132(a). Given the Western Electric decision, the mandate of Labor Code 3202 for liberal construction and the rubric that if the evidence reasonably supports an inference in favor of an injured worker, that inference should be drawn. I believe the award complained of was compelled, and is supported by case law and substantial evidence in the form of Dr. Storey's opinion and the actually demonstrated work capacity.

RECOMMENDATION

I respectfully recommend that the Petition for Reconsideration be denied.

/s/ William R. Butler
WILLIAM R. BUTLER,
WORKERS' COMPENSATION JUDGE

WRB:db

DATE:

Served on Parties by Mail as Shown on the Official Address Record.

By: /s/ Deena L. Briggs

Rucka, O'Boyle and Lombardo
245 W. Laurel Drive
Salinas, CA 93906

Littler, Mendelson, Fastiff & Tichy
2049 Century Park East, #1660
Los Angeles, CA 90067

APPENDIX R.

Answer and Brief in Opposition to Petition for Writ of Review [by Dalgety Foods, Inc.] (September 8, 1981).

In the Court of Appeal of the State of California, First Appellate District, Division Two.

Angelina Avina, Petitioner, v. Workers' Compensation Appeals Board of the State of California, et al., Respondents. Case No. 1 Civil 53500.

Filed: September 8, 1981.

On Petition for Writ of Review of the Final Judgment and Orders of the Workers' Compensation Appeals Board.

I

INTRODUCTION

On September 12, 1979, Respondent Dalgety Foods, Inc. ("Dalgety" or "Employer") terminated the Petitioner, Ms. Avina. She grieved her discharge through the negotiated grievance procedure provided for in a collective bargaining agreement in effect between the parties, ultimately bringing her case to arbitration before a neutral arbitrator. After a full day's hearing, and after both sides had a full and fair opportunity to argue their respective positions, the Arbitrator ruled that Dalgety had properly discharged Ms. Avina because (1) it genuinely and in good faith believed that continuing to employ Ms. Avina would create an unacceptably high risk of injury to herself or fellow workers and (2) continuing to employ Ms. Avina would in fact have created such an unacceptable risk.

Subsequently, Ms. Avina pressed a claim under Labor Code Section 132a, alleging that the real reason for her discharge was that she had resorted to workers' compensation proceedings. The parties participated in another full

day's hearing, this time before Workers' Compensation Judge William R. Butler, at which they presented evidence virtually identical to that presented in the arbitration hearing. On March 3, 1981, Judge Butler issued a decision, consisting of Supplemental Findings & Award and Order and an Opinion on Decision, together with a Summary of Evidence, (attached hereto as Exhibits "A-1", "A-2", and "A-3" respectively) that determined that Dalgety had violated Section 132a by discharging Angelina Avina.

Judge Butler found that Dalgety had discharged Ms. Avina in the genuine and good-faith belief that continuing to employ her would create an unacceptably high risk of injury to herself or her co-workers. Unlike the Arbitrator, however, Judge Butler ruled that Dalgety's belief was mistaken. Stating that he was bound by *Western Electric Company v. WCAB*, 99 C.A.3d 629 (1979) to penalize the Employer for its — in his opinion — mistaken belief, Judge Butler held Dalgety had violated Section 132a.

Dalgety petitioned for reconsideration of that decision on March 30, 1981. Judge Butler submitted a Report and Recommendation on Petition for Reconsideration (attached as Exhibit "B") in opposition to Dalgety's petition. On May 29, 1981, the Workers' Compensation Appeals Board ("WCAB" or "Board") reversed the trial judge's ruling, holding in its Opinion and Order Granting Reconsideration and Decision after Reconsideration (attached as Exhibit "C") that Dalgety's good-faith belief immunized it from liability under Section 132a for its discharge of Ms. Avina. Ms. Avina filed a Petition for Reconsideration of that decision on June 19, 1981. On July 14, 1981, the Board issued an Opinion and Order Denying Reconsideration (attached hereto as Exhibit "D"). Ms. Avina filed with this Court a Petition for Writ of Review ("Petition") on or about August 13,

1981. Pursuant to California Rule of Court 57(b) and California Labor Code Section 5959 *et seq.*, Dalgety hereby answers, and requests that this Court deny, the Petition.

II

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was the Board, and is this Court, preempted by federal law from granting Ms. Avina the relief she seeks because her request for relief was previously denied in arbitration proceedings provided for by the collective bargaining agreement in effect between the parties at the time of the discharge?

2. Is Ms. Avina collaterally estopped by the arbitration award from arguing that Dalgety did not discharge her in the good-faith belief that her continued employment would have created an unacceptably high risk of injury to herself or her co-workers or that her continued employment would in fact have created such an unacceptable risk?

3. Does substantial evidence support the Board's ruling that Dalgety did not violate California Labor Code Section 132a by discharging Ms. Avina because Dalgety acted on a good-faith belief that continuing to employ Ms. Avina would have created an unacceptably high risk of injury to herself or to her co-workers?

III

COUNTERSTATEMENT OF FACTS

The Employer hired Angelina Avina as a general production worker in 1978.[1] On September 12, 1979, the Employer was forced to terminate her.

---

[1]The facts recited herein are drawn from Judge Butler's Summary of Evidence (Exhibit "A-3") and the record evidence. A detailed statement of facts is necessary because the Petitioner is challenging the factual basis for the Board's decision. *See* Petition at 3. Except where they are consistent with this Counterstatement of Facts, Respondent Dalgety denies the factual allegations of the Petition.

This termination did not come easily to Dalgety Foods, Inc. Dalgety is a company that prides itself on the fairness and consideration with which it treats its employees. The Employer realizes that no job means no paycheck and that, as a result, an employer has a responsibility to its employees to discharge them only under appropriate circumstances. Dalgety takes that responsibility very seriously. But, coupled with the Employer's concern for individual employees is a far greater concern for the employees as a group. Accordingly, the Employer follows an ironclad policy of not allowing a person to work if it appears that there would be an undue risk of serious bodily injury to that person or his fellow workers.

The Employer became aware that, due to an apparently substantial physical disability, Ms. Avina might present just such an unacceptable risk. Even then, however, termination did not come automatically. It was only after nearly two months of careful investigation and deliberation that the Employer decided it had no choice but to discharge the Applicant. There was simply too great a chance that her physical disability could create a situation in which her fellow workers, as well as herself, would be seriously injured.

Mr. Brian Muth, then Corporate Safety Manager, collected the relevant information: what Ms. Avina's job entailed, what her medical history revealed about her physical disability, and what the safety risks were. After his investigation, Mr. Muth concluded that continuing to employ the Applicant would create an unacceptably high risk of injury to her fellow workers and herself. Accordingly, he recommended that Mr. Bob Batterson, then the Employer's Director of Industrial Relations, discharge Ms. Avina. As was customary, Mr. Batterson followed Mr. Muth's recommendation.

Extensive evidence was presented at the trial concerning the investigation, and the facts collected in it, which formed the basis for the decision to discharge Ms. Avina. The possibility that continuing to employ her would run afoul of the Employer's obligation to protect its employees from harm on the job first came to the Employer's attention in mid-July, 1979. At that time, Mr. Muth learned of an Order Approving Compromise and Release (hereinafter "C & R Order") which awarded Ms. Avina $22,628.80. It was an unusually large award, Mr. Muth thought, and suggested a very substantial physical disability. Mindful of Dalgety's policy of not assigning work to a person where risk to herself or others seemed unduly high, Mr. Muth began investigating the extent of Ms. Avina's physical disability.

The investigation proceeded on several fronts. First, Mr. Muth sought to ascertain the significance of the C & R Order in terms of the physical disability it represented. Mr. Muth checked the standard Table of Permanent Disability Indemnity and discovered that $22,628.80, the dollar amount of the C & R Order, equated with a 62% disability rating. He then obtained the independent opinion of Dalgety's compensation carrier as to the extent of disability represented by the C & R Order. His own opinion was confirmed. Moreover, Mr. Muth was advised that the C & R Order represented a compromise from at least one report which assessed Ms. Avina's disability at 83%.

However, Mr. Muth realized that the rating alone did not answer his questions. The Employer carefully eschews a policy of discharging an employee simply because he or she receives a disability rating of some figure. A particular disability rating alone is inadequate to inform Dalgety whether an employee is too disabled to allow him or her to continue to work. Instead, the Employer must look to the particular circumstances of the case, including, for example,

comparing which specific physical functions were impaired with which functions are necessary to the job so as to insure efficient production and the safety of the employees.

Dalgety follows a policy of reviewing the medical records of an employee if a potential problem with safety comes to light. Accordingly, after the compensation carrier confirmed that the C & R Order represented a disability rating of 62%, Mr. Muth sought more detail about the extent of physical impairment Ms. Avina suffered, including her medical background. To convert Ms. Avina's disability rating into specific restrictions on particular movements, Mr. Muth then consulted the standard Rating Plateau Guidelines For Work Capacity. Under those Guidelines, he learned that she fell into Category G, which meant she had lost over 50% of her ability to push or pull or perform similar tasks, and she was able to work only if half of the time were sitting, and half standing.

Mr. Muth also obtained extensive reports of various doctors which detailed Angelina Avina's medical history and her physical limitations. One thing that came to light was that, during the prior seven years, Ms. Avina had suffered an unusual series of injuries which had required substantial time off for treatment and recuperation. For the most part, these injuries consisted of falls which injured her right hand and wrist, her right knee, and her back.

Ms. Avina's accidents began in 1972, when she fractured her right thumb. On June 21, 1973, she fell at work, fracturing her right wrist and left fifth finger. The fracture of her right wrist was severe enough to require that it be encased in a case. Less than three months later, while at home on September 17, 1973, Ms. Avina fell again and reinjured that same wrist.

Ms. Avina eventually returned to work after these injuries, but she suffered more accidents, as well — both in-

dustrial and non-industrial. On some uncertain date, probably December 10, 1975, she lacerated her right index finger with a knife. Some months later, on July 19, 1976, she slipped again at work on her way to the lavatory. The resultant twist to her right knee was so severe that ultimately it was followed by a total knee replacement. Ms. Avina sustained another knife cut on July 28, 1977, this time to her right inner arm.

In late 1978 or early 1979, Ms. Avina's right knee was totally replaced in surgery by Dr. Stephen D. Storey. Shortly thereafter, in early July, 1979, she fell yet again while shopping at a supermarket, seriously injuring her low back.

Included among the doctors' reports which came to his attention, Mr. Muth found a detailed and very recent letter from Dr. H. Phillip Dohn. This letter, dated March 5, 1979, not only confirmed Mr. Muth's conclusion that Ms. Avina's physical impairments placed her in Category G of the Rating Plateau Guidelines For Work Capacity, but also that there were serious physical limitations which he had to consider with regard to her ability to safely continue work at Dalgety. Dr. Dohn also went into detail about Ms. Avina's physical disabilities:

> When questioned, the patient states she has definite difficulty in the use of the right wrist and hand, complaining of awkwardness on fine motions and a definite and major loss of strength and grasp. The patient also states that she has some persistent low grade discomfort in the right knee which at times becomes rather definitely painful if she walks a lot. She states if she walks on uneven ground she will have a definite aggravation. The patient states the pain will radiate up into the mid-thigh and will radiate down into the mid-calf region.

Dr. Dohn measured the range of knee motions and discovered that Ms. Avina's right knee could flex only over

85°, while her left knee could flex over 135°. Moreover, "[t]he patient shows definite evidence of 7 or 8° of a medical lateral instability in the right knee." The doctor continued, stating that "[s]tudies of the right knee show definite evidence of markedly advanced degenerative arthritic changes of the joint."

Dr. Dohn's examination showed that Avina's right wrist, as well, was seriously impaired:

> Evaluation of the right wrist shows definite evidence of a moderate Silver fork deformity of the wrist. The patient at rest holds the wrist in the radial deviated position by about 15° on the right.

Furthermore, Ms. Avina's right wrist had an extension of only 65 degrees, as compared to 70 degrees for the left, and a flexion of only 45 degrees, as compared to 75 degrees for the left. The left wrist could describe an Ulnar deviation of 30 degrees, but the right could describe only trace Ulnar deviation. Similarly, the grasp in her right hand was markedly inferior to that in her left:

> Grasp with two Jamar Type dynamometers used simultaneously produces the following readings:

Right:	5	5	3	kgm
Left:	14	12	10	kgm

All told, Mr. Muth examined at least five doctors' reports. He also learned, from a report by Dr. Storey on Ms. Avina's condition after her most recent fall in July of 1979, that she had a congenital low back deformity. Mr. Muth took particular note of that and, on August 8, 1979, the Employer, by Mrs. Bess Shimmon, Dalgety's nurse, contacted Dr. Storey to investigate Ms. Avina's ability to do particular aspects of her job as briefly described in Mrs. Shimmon's letter to Dr. Storey. Dr. Storey promptly replied that "reaching at arm's length across a waist-high conveyor belt would not only be dangerous for her, but possibly impossible for

her.'' The doctor added that ''cold environments would probably aggravate her problem so she should probably not work in a cold and drafty environment.''

The actual job, of course, was substantially more difficult and strenuous than a brief description could convey. Thus, the Employer gave little weight to a subsequent printed form from Dr. Storey's office, dated September 6, 1979, that released Ms. Avina for work with ''no restrictions'', inasmuch as Dr. Storey could have relied only on the brief job description in Mrs. Shimmon's letter and the representations of Ms. Avina herself as to the difficulty or requirements of her job.

Indeed, Dr. Storey admitted as much after he had become familiar with the nature of the jobs for which Ms. Avina would be responsible. At the trial, he stated that, after becoming more familiar with those jobs, *he felt Ms. Avina would have been unable to perform her jobs at Dalgety at the time of her discharge for longer than 10 days or 2 weeks.* Especially in view of the numerous repetitive motions she would be called upon to perform, he felt the Dalgety jobs would result in severe disabling symptoms within that time, rendering Ms. Avina unable to work.

Given the working conditions at the plant, the onset of such symptoms would create an extremely high risk of accidents. The Employer presented extensive evidence identifying numerous examples of potential hazards to the safety of Ms. Avina and her fellow employees. For example, Ms. Avina would repeatedly have to climb stairs to get to the carrot area or the broccoli line. The wet surface of the wooden stairs is slippery and could constitute a serious hazard for an employee with Ms. Avina's condition. Since the employees tend to go up and down the stairs in groups, if one employee fell she could easily take several others with her. Similarly, given that there is a great deal of water

on the floors in the plant, the risk of falling for an employee with Ms. Avina's condition is especially high. The employees tend to work in close physical proximity with each other, and if, for example, one fell onto a belt, other employees might easily be injured. If such an accident occurred on the broccoli trimming line, where the employees must wield sharp knives, such a fall could prove disastrous. Ms. Avina had apparently already cut herself in this fashion.

Mr. Muth testified more extensively about the safety hazards especially dangerous for an employee in Ms. Avina's condition. He was most concerned, he explained, about her falling — especially because Ms. Avina's accident record showed an extremely high proportion of injuries that resulted from falling and her replaced knee rendered her relatively unstable on her feet. In addition, falling in certain areas could result in special problems. Ms. Avina could become entangled in a piece of equipment, like the carrot saw.

After weighing all the evidence that his thorough investigation had produced, Mr. Muth concluded that Ms. Avina's continued employment at Dalgety presented an unacceptably high risk of injury to herself or her fellow workers. Accordingly, he was left with no choice but to terminate her.

Ms. Avina and her collective bargaining representative, Teamsters Local Union No. 890, grieved the discharge. The grievance was processed through the steps provided for in the applicable collective bargaining agreement and ultimately was submitted for decision to an impartial Arbitrator. The Arbitrator held a full day's hearing, on October 26, 1979, in which the parties had a full and fair opportunity to present their cases. Extensive evidence was introduced; indeed, *the evidence presented at the arbitration hearing coincides almost precisely with that presented at the Section 132a trial herein*. After considering that evidence, the ar-

bitrator ruled that the discharge did not violate the collective bargaining agreement.

In his Decision and Award, received in evidence by Judge Butler, the Arbitrator elucidated the reasons for his finding. He expressly made factual determinations both of the true reason for the discharge and of Ms. Avina's ability to continue working.

With respect to the reason for the discharge, the Arbitrator acknowledged the extensive investigation undertaken by the Employer. He expressly ruled that Dalgety discharged Ms. Avina in the genuine and good-faith belief that her continued employment presented an unacceptably high risk of injury to both Ms. Avina herself and her co-workers.

In addition, the Arbitrator discussed Ms. Avina's medical condition at length and expressly determined that, in fact, the Employer was quite correct to believe that Ms. Avina could not continue to work safely. Excerpts from his Decision and Award serve to show that the arbitrator specifically dealt with this issue:

> [There is] a strong possibility of future injuries unless Ms. Avina conducts herself very, very carefully and does not get involved in a hazardous environment. . . .
>
> Ms. Avina's arthritic condition can only, by any standard of measurement, be expected to progressively deteriorate. . . .
>
> The back condition will probably not get better and has high possibilities of getting worse, especially if she should suffer another fall. No improvement can be reasonably anticipated insofar as her wrist is concerned and, with the presence of arthritis, one can assume that it is degenerative. In the case of her prosthetic knee, it would seem reasonable to conclude that she will have ever-increasing difficulty in spending a full work shift standing before a belt or a table, and indulging in

> motions that exercise her arm and back, causing constant shifts in the weight on her legs and feet. The wet environment and the necessity to use stairs, occasionally or frequently, presents a real impediment to her well being.

In short, the Arbitrator expressly agreed with the Employer's judgment that continuing to employ Ms. Avina would present an unacceptably high risk of injury to herself or her fellow workers. *Ms. Avina did not attempt court action to modify or set aside the arbitration award or the Arbitrator's factual determinations.*

On February 5, 1981, Judge Butler presided over the trial of Ms. Avina's claim that the Employer's action in discharging her discriminated against her in violation of Labor Code Section 132a. Both parties presented evidence virtually identical with that which they presented at the arbitration hearing. The parties were not permitted to brief their positions. Judge Butler issued a decision on March 3, 1981, in which he found that, although the Employer had discharged Ms. Avina because of its genuine and good faith belief that her continued employment would present an unacceptable risk of future injury, the discharge nonetheless violated Section 132a.

On March 30, 1981, the Employer petitioned for reconsideration of that decision on several grounds. On May 29, 1981, the Workers' Compensation Appeals Board reversed the trial judge's decision, holding *inter alia* that the Employer's genuine and good-faith belief that continuing to employ Ms. Avina would present an unacceptably high risk of injury to herself or others sufficed to exonerate it from any charge of discrimination under Labor Code Section 132a. Ms. Avina petitioned for reconsideration of that decision, but the Board refused to reverse its stand. Ms. Avina subsequently petitioned this Court for a writ of review to challenge the Board's decision.

IV

ARGUMENT

A. THIS COURT IS PREEMPTED BY FEDERAL LAW FROM GRANTING MS. AVINA RELIEF

Ms. Avina and the Employer were participants in a collective bargaining relationship. While employed by Dalgety, Ms. Avina's wages and other terms of employment were governed by a collective bargaining agreement. Pursuant to that agreement, Ms. Avina and her collective bargaining representative, Teamsters Local 890, grieved the discharge which is the subject of this action. The grievance was processed through the steps of the negotiated grievance procedure and ultimately was submitted to arbitration.

After a full and fair hearing in which the parties took full advantage of the opportunity to present their positions, the Arbitrator found that (1) the Employer discharged Ms. Avina solely because it genuinely and in good faith *believed* that continuing to employ her would present an unacceptably high risk of injury to herself or others[2] and that (2) in fact, her continued employment *would* have presented such an unacceptably high risk. Accordingly, the Arbitrator upheld the discharge and denied Ms. Avina the relief she sought, including reinstatement and back pay.

Now, invoking Labor Code Section 132a, Ms. Avina again challenges the discharge and seeks reinstatement and back pay — precisely the remedies denied her in the collective bargaining process.

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[2]Because Judge Butler ruled that no discriminatory or unlawful motive existed on the part of the Employer, it is unnecessary at this point to argue at length that, under state and federal law and the parties' collective bargaining agreement, no termination actually occurred until the arbitration decision confirmed the propriety of the Employer's decision not to return Ms. Avina to work and, therefore, no improper motive could be assigned to the termination because the alleged discrimination is not apparent within the four corners of the arbitration decision.

Federal law preempted the Board, and precludes this Court, from granting relief to Ms. Avina. The circumstances of discharges and the procedures by which disputed discharges may be resolved are mandatory subjects of bargaining under the National Labor Relations Act, as amended (29 U.S.C. § 150 *et. seq.*). *E.g., National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (discharge); *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403 (9th Cir. 1978), *enforcing in relevant part* 229 NLRB 757 (1977) (grievance procedure); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943) (arbitration). The parties herein were also parties to the collective bargaining agreement which set forth the negotiated resolutions of those matters, pursuant to which Ms. Avina pressed — and lost — her bid for reinstatement.

In these circumstances, the California Labor Code may not be applied to give to one party that which she was unable to obtain through the negotiated procedures. Such an application would frustrate the parties' solution of a problem that Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal labor law precludes such a result.

Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959), is the seminal case on point. *Oliver* involved a provision of another Teamsters collective bargaining agreement which set minimum rentals to be paid when an owner-operator leased his truck and services to a carrier. One such owner-operator, joined by several carriers, sued in state court to enjoin the enforcement of that provision. The state court granted the injunction on the ground that the challenged provision of the collective bargaining agreement violated the state antitrust law.

The United States Supreme Court reversed. It noted first that the challenged contractual provision set wages in certain

situations, a mandatory subject of bargaining under the National Labor Relations Act. Application of the state antitrust law would prevent the parties from carrying out their agreement on those issues which they had arrived at through the collective bargaining process. But Congress had not affirmatively indicated that the states could limit the content of collective bargaining agreements with respect to their antitrust implications. Accordingly, the Supreme Court unequivocally held the state law preempted because:

> The application [of state law] would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. . . . Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the state.

Id. at 296.

The instant case presents the same situation. The parties had negotiated the means by which their disputes over discharges would be resolved and the circumstances in which discharges would be proper. Pursuant to that negotiated arrangement, Ms. Avina challenged her discharge in arbitration, where she lost. In effect, the parties bargained for a resolution of the dispute and the Employer prevailed. Application of Labor Code Section 132a to grant Ms. Avina relief would invalidate the agreement reached through the collective bargaining process mandated by Congress. *Oliver* rejects such a result.

Five years after *Oliver*, the Supreme Court repeated its admonition in *Teamsters Local 20 v. Morton*, 377 U.S. 252

(1964), a case that involved a suit in federal district court alleging, among other things, a state cause of action for damages. The plaintiff was an employer whose facility was the site of an economic strike conducted by the union representing the employees. The strike occurred subsequent to an impasse in contract negotiations.

In the course of the strike, the union persuaded the management of one of the employer's customers to cease doing business with the struck company. State common law prohibited the union's appeal to the customer. The trial court awarded both compensatory and punitive damages to the struck employer. The appellate court affirmed.

The Supreme Court reversed. Federal law neither protected nor prohibited the union's activity, so the Court inquired "whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation." *Id.* at 258. The Court found no affirmative Congressional intent to permit a state to take from the union the economic weapon it had exercised in the course of its collective bargaining relationship with the plaintiff. Accordingly, *state law could not be used to alter the results achieved by the parties themselves* in the process of collective bargaining:

> For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.

Id. at 260. *Accord, Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

In the instant case, Ms. Avina brought a state action just as in *Morton*. Precisely as in *Morton*, she seeks to use state law to obtain a result different from that which came out of the collective bargaining relationship between the parties.

Just as in *Morton*, federal law preempts such an application of state law. In sum, where the parties to a collective bargaining relationship have agreed on a solution to a dispute over a mandatory subject of bargaining — as they did in this case by submitting the dispute over Ms. Avina's discharge to final and binding arbitration — state law *may not be used to alter the results achieved through the collective bargaining process*. Accordingly, the Board was, and this Court is, preempted from granting Ms. Avina the relief she seeks.

B. COLLATERAL ESTOPPEL BARS MS. AVINA FROM OBTAINING RELIEF.

If the Employer (1) discharged Ms. Avina because it believed her continued employment would present an unacceptably high risk of injury, and (2) was correct in that belief, it is clear that no violation of Labor Code Section 132a can have occurred. *See, e.g., Judson Steel Corp. v. WCAB*, 22 C.3d 658, 667 (1978); *Santa Barbara v. WCAB*, 109 C.A.3d 211, 215 (1980). As the Court stated in *Western Electric Company v. WCAB*, 99 C.A.3d 629 (1979):

> Western asserts it discharged Smith as there was no work available which she could perform without the risk of either reinjury or further injury. If this is the true reason Western refused to allow Smith to return to work, then there was no Section 132a violation.

Id at 644-45.

In the instant case, both facts — (1) that Ms. Avina was discharged for fear of injury and (2) that that fear was justified — were established in the arbitration case preceding the Section 132a trial. The parties to this action were also parties to those arbitration proceedings. At the arbitration hearing, both parties, through their respective counsel, fully and fairly litigated the circumstances of the discharge. *They*

focused on the Employer's reason for the discharge and the issue whether Ms. Avina's continued employment would present an undue risk of injury. The evidence presented at the arbitration hearing was substantially identical to that presented at the Section 132a trial. The Arbitrator expressly made factual determinations that (1) the Employer's true reason for discharging Ms. Avina was that it genuinely and in good faith *believed* that her continued employment would present an unacceptably high risk of injury to herself and her co-workers; and (2) in fact, Ms. Avina's continued employment *would* have presented such a risk.

In these circumstances, the Arbitrator's factual determinations are binding on Ms. Avina and this Court under the doctrine of collateral estoppel.[3] *See Carroll v. Puritan Leasing Co.*, 77 C.A.3d 481, 491-93 (1978); *Tevis v. Biegel*, 156 C.A.2d 8 (1957); 4 Witkin, California Procedure (Judgment) § 197 *et seq.* (2d ed. & Supp. 1979). As the Court declared in *Lehto v. Underground Construction Co.*, 69 C.A.3d 933 (1977):

> The policy of the law is to favor arbitration, and every reasonable intendment is indulged to give effect to such proceedings. . . . *Once a valid award is made by the arbitrator, it* is *conclusive on matters of fact and law and all matters in the award are thereafter res judicata.*

Id. at 939 (emphasis added). *Accord, Lindholm v. Galvin*, 95 C.A.3d 443, 450 (1979).

C. THE BOARD CORRECTLY RULED THAT NO VIOLATION OF SECTION 132A OCCURRED

After the trial, the Workers' Compensation Judge found that Dalgety discharged Ms. Avina because of its good-faith belief that continuing to employ her would create an undue

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[3]The Employer also contends that the Arbitrator's decision constitutes res judicata as to Ms. Avina's claim under Section 132a.

risk of injury. Nevertheless, the Judge ruled that Dalgety had violated Section 132a because he disagreed with Dalgety's judgment and believed Ms. Avina capable of working without such risk. The Board reversed the Judge as to the legal conclusion to be drawn from that difference in judgment. Whereas the Judge felt Dalgety violated Section 132a because its good-faith belief was, in his opinion, mistaken, the Board held that no unlawful discrimination could have occurred where the Employer's motives were pure. The Petitioner challenges this determination on essentially two grounds.[4]

1. Ms. Avina's Claim that Dalgety's Good-Faith Belief Was Unreasonable

Importantly, Ms. Avina does *not* claim that Dalgety discharged her without a good-faith, non-discriminatory reason. Instead, she argues that Dalgety's good-faith belief was unreasonable. (Petition at 14-15.) For two reasons, Ms. Avina's contention must fail. First, this argument is raised for the first time before this Court. Ms. Avina's failure to raise this issue in her petition for reconsideration before the Board constitutes a waiver of the argument. Labor Code Section 5904; *Cedillo v. WCAB*, 5 C.3d 450, 455-56 (1971); *U.S. Auto Stores v. WCAB*, 4 C.3d 469, 476-77 (1971).

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[4]Ms. Avina also argues that "both Dalgety's investigation and all derivative events, including her dismissal, were . . . in violation of Labor Code §132(a)." (Petition at 10.) Because Ms. Avina never argued to the Board that anything other than the *discharge* violated Section 132a, she must be deemed to have waived any claim that the *investigation* violated that Section because it was prompted by the C & R award. *See, e.g., Cedillo v. WCAB*, 5 C.3d 450, 455-56 (1971). Even were the issue properly before this Court, it should be lightly dismissed. It is absurd to suppose that an employer's attempt to ascertain whether an employee could work safely could violate Section 132a merely because workers' compensation proceedings brought to the employer's attention the possibility of a safety hazard.

Second, even if this issue were properly before this Court, the record shows that Dalgety's good-faith belief was in fact reasonable. We have already detailed the care with which Mr. Muth investigated Ms. Avina's situation and determined that continuing to employ her presented an undue risk of injury to herself or her fellow workers. At the trial, Dalgety presented extensive evidence on this point. It outlined the many steps taken by Mr. Muth during the nearly two months that he investigated the extent of Ms. Avina's physical impairment, the nature of the jobs she would have to be able to perform, and the safety hazards present in the plant. The record before Judge Butler contained much testimony and other evidence consistently demonstrating that Mr. Muth discharged Ms. Avina for the sole reason that he believed in good faith that her continued employment presented an unacceptably high risk of further injury and that he reached that belief only after a protracted and thorough investigation. No contrary evidence was introduced. That evidence demonstrates the reasonableness of Dalgety's belief.

In addition, at the trial, the reasonableness of this belief was conclusively established by Dr. Storey. He testified at length to the many injuries to Ms. Avina or her co-workers that could occur if she were allowed to continue working. Furthermore, Dr. Storey testified that, after becoming familiar with the nature of the jobs that Ms. Avina would be called upon to perform, *he believed that Ms. Avina would have been unable to perform her jobs at the time of her discharge for longer than 10 days or 2 weeks*. In light of this supporting medical opinion, the reasonableness of Dalgety's good-faith belief that Ms. Avina could not safely work cannot seriously be questioned.[5]

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[5]Moreover, as is discussed *infra*, there is no legal requirement that an employer's reason for a discharge be reasonable; all it need be is genuine and in good faith. *Cf. Burton v. WCAB*, 112 C.A.3d 85, 88 (1980) (" '[S]ection 132a prohibits the employer from *arbitrarily* taking action against his employee or the *sole* basis that the employee sustained an industrial injury' " (emphasis added)).

2. Ms. Avina's Claim That Dalgety's Good-Faith Belief Was Mistaken

The second ground on which Ms. Avina challenges the Board's action consists of two parts. First, she argues that Dalgety was simply wrong to believe that her continued employment would have created an undue risk of injury. Second, she contends that Dalgety's alleged error in judgment compels a finding of violation of Section 132a. Both claims are incorrect.

a. *There Was an Undue Risk of Injury*

It is true that Judge Butler felt Ms. Avina successfully demonstrated that Mr. Muth was incorrect to determine that her continued employment presented an unacceptably high risk of injury to herself or her co-workers. However, the only evidence in Ms. Avina's support was her own testimony that she had worked for a period of time at another employer's facility, long after her discharge from Dalgety, without a severe worsening of her medical condition. In the Judge's words, Ms. Avina "demonstrated by the fact of her return to work [at another employer] for several months that she was capable of performing her work [at Dalgety]." (Exhibit "A-2" at 1.)

For four distinct reasons, however, Ms. Avina's "return to work" does *not* demonstrate that Mr. Muth was incorrect to believe that there was an undue risk of injury. First, even under Judge Butler's (and apparently Ms. Avina's) view of the law, the proper inquiry is whether "she could have returned to work without *risk* of reinjury or further injury to herself [or others].' " (Exhibit "A-2" at 1 (quoting *Western Electric, supra*) (emphasis added).) *Merely because the risk is not realized in a particular case does not mean that it did not exist*; merely because Ms. Avina may have demonstrated that she did not in fact injure herself or others at

her new job does not mean that there was not an unacceptably high risk that she would. The evidence conclusively demonstrates that the risk existed at the time the termination decision was made. Subsequent events are irrelevant.

Second, Judge Butler placed undue emphasis on his determination that continued employment did not worsen Ms. Avina's medical condition. He should have, and this Court must, look instead at *the likelihood of disabling symptoms*. As Mr. Muth repeatedly testified, he was mainly concerned with the risk of accidents, particularly falls. That is why he was concerned more with "prognostication of an expected inability to perform certain tasks" than with "a restriction imposed by medical advice, to refrain from those same tasks in order to prevent further harm". (Exhibit "A-2" at 2.) If, as Mr. Muth reasonably expected *and Dr. Storey categorically predicted*, continued employment would result in severely disabling symptoms, the likelihood of accidents would greatly increase. And, indeed, Ms. Avina had only worked at her new employer's for a short time before she had an accident. Thus, it is irrelevant to the proper inquiry in this case that Ms. Avina's subsequent employment did not worsen her medical condition, apart from symptoms. The high probability that disabling symptoms would develop, and that such symptoms would result in an accident such as a fall or a slip with a knife, established that an undue risk of injury existed.

Third, Judge Butler improperly relied on events that occurred long after Ms. Avina's last day at Dalgety. Even under Judge Butler's and Ms. Avina's view of the law, the only possible relevant issue was whether, *at the time the termination decision was made by Mr. Muth*, Ms. Avina was able to perform her job without undue risk of accident. The letter of termination was dated September 12, 1979. The period to which Judge Butler looked to evaluate Ms.

Avina's job ability began in May, 1980 — some *8 months later*. It goes without saying that a lot of recuperation can occur in 8 months.[6] It was plainly unreasonable for Judge Butler to hold Mr. Muth's judgment faulty on the basis of Ms. Avina's medical condition two-thirds of a year after the fact.

Finally, Ms. Avina's performance at her new employer's could not rationally shed light on the accuracy of Mr. Muth's judgment eight months before unless her new job and the jobs at Dalgety were comparable. But, at the Section 132a trial, Judge Butler refused to allow counsel for Dalgety to pursue a line of questioning aimed at precisely that issue, despite counsel's objections. Counsel was not permitted, for example, to cross-examine Ms. Avina to elicit testimony describing her new job in detail. Without such testimony, however, a comparison of her new job with those for which she was responsible at Dalgety is impossible. Accordingly, there is no record evidence suggesting that successful performance at the new job suggests the probability of successful performance at the old.

In sum, for these four distinct reasons, no record evidence supports Ms. Avina's contention that, at the time of her discharge, she was able to continue working at Dalgety without creating an unacceptably high risk of injury.

b. *Whether the Risk of Injury Existed Is Irrelevant*

Even if this Court finds that Ms. Avina is correct to charge that Dalgety was mistaken in believing a risk of injury existed, no violation of Section 132a can have occurred.

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[6]Judge Butler himself implicitly acknowledged that Ms. Avina did in fact recuperate with surprising rapidity, observing that, "had the [compensation] case been resolved by trial or stipulated rating, a Petition to Reopen and Reduce would now lie" because Ms. Avina apparently had shed much of her disability. (Exhibit "A-1" at 3.)

The simple fact is that Section 132a cannot be violated without a lawful, discriminatory motive. Because Dalgety's motives were unquestionably lawful, even if based on a mistake of fact, Dalgety did not violate Section 132a by discharging Ms. Avina.

At all stages of the proceedings before the Board, evaluation of Ms. Avina's contention centered on one case: *Western Electric Company v. WCAB*, 99 C.A.3d 629 (1979). At the trial level, Judge Butler interpreted this case to mean that only a *correct* good-faith belief could exonerate Dalgety. That view, adopted by Ms. Avina, was twice rejected by the Board. This Court, too, must reject it.

Western Electric did involve facts very similar to those in the instant case. An employee had suffered an industrial injury that resulted in a certain degree of permanent disability. After reviewing the medical evidence and the nature of the available jobs, the employer discharged the employee on the professed ground that her continued employment would present an unduly high risk of further injury. The employee charged that this reason was a mere pretext and that she was really discharged because she had applied for workers' compensation benefits.

The Workers' Compensation Judge ruled that the employer had not violated Section 132a. On reconsideration, the Board reversed. The Board "was of the opinion that neither medical evidence nor the eventual appeals board disability rating indicated [the employee] was unable to do her job" and that, therefore, " '[the employer's] refusal to allow [the employee] to return to work was unwarranted.' " 99 C.A.3d at 637. In other words, the Board felt that no real risk of injury existed. Thus, the Board in the *Western Electric* case did take the position advanced by Ms. Avina in the instant case; namely, that an employer violates Section 132a if the employee actually could do the work the em-

ployer claimed she could not perform without undue risk of injury.[7]

But the Court of Appeal *reversed* the Board. The Court of Appeal held that no violation of Section 132a could be found unless the employer's asserted reason for discharging the employee — the risk of further injury — was a mere pretext, concealing a retaliatory or discriminatory motive. Analyzing the seminal case of *Judson Steel Corp. v. WCAB*, 22 C.3d 658 (1978), the *Western Electric* Court explained that "*Judson Steel* establishes that Section 132a prohibits the employer from *arbitrarily* taking action against his employee on the *sole* basis that the employee sustained an industrial injury." 99 C.A.3d at 644 (emphasis added).

Where the *true reason* for the discharge was not arbitrary or related to workers' compensation proceedings, however, no violation of Section 132a can have occurred:

> Western asserts it discharged Smith as there was no work available which she could perform without the risk of either reinjury or further injury. *If this is the true reason Western refused to allow Smith to return to work, then there was no section 132a violation.*

Id. at 644-45 (emphasis added). Under *Western Electric*, therefore, the Board's inquiry must stop once it has determined the "true reason" for the discharge. Section 132a is violated only if the "true reason" was to penalize the employee for participating in workers' compensation proceedings or sustaining an industrial injury.

The Court of Appeal recognized, however, that this inquiry into the "true reason" for a discharge might well involve difficult problems of proof. A discharged employee

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[7]The Board in *Western Electric* also credited the employee's testimony that the employer had indicated her workers' compensation case was the reason for the discharge. 99 C.A.3d at 637.

would have trouble proving that her employer's "true reason" was to retaliate against her for her resort to workers' compensation proceedings if the employer steadfastly maintained that his "true reason" was to protect against what he saw as an undue risk of further injury.

The solution, the *Western Electric* Court decided, was to utilize a shifting burden of proof. If the employee could show that, regardless of what the employer professed to believe, there really was no undue risk of injury, it would be presumed that the employer's "true reason" for the discharge was to punish the employee for participating in workers' compensation proceedings or sustaining an industrial injury. The burden of proof would then shift to the employer to demonstrate that his "true reason" really was to avoid further injury.

If the employer could not carry this burden — if he could not convince the Board that, although he may have been mistaken, he had genuinely believed that the employee's continued employment presented an undue risk of further injury — then the Board would find that he had violated Section 132a. But, if the employer *could* demonstrate to the Board's satisfaction that his "true reason" for the discharge was that he had believed in good faith that there was an unacceptable risk of injury, then the employer would succeed in carrying his burden of proof and the inference of unlawful motive would be overcome.

In other words, if the employee can demonstrate that, in fact, no risk of injury existed, the Board may draw the initial inference that the employer's professed reason for the discharge was merely pretextual and concealed a discriminatory motive. However, if the employer can present sufficient evidence to convince the Board that the "true reason" for the discharge really was his (possibly mistaken) belief that a risk of injury existed, then the inference of

unlawful motive is overcome. As the *Western Electric* Court put it:

> [I]f Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself, then the Board could properly draw an inference of prohibited discriminatory action by Western *unless Western can otherwise demonstrate to the contrary*.

Id. at 645 (emphasis added.)[8] Accordingly, the *Western Electric* Court annulled the Board's finding of a violation of Section 132a.

The instant case presents the same issue as *Western Electric*. Just as in *Western Electric*, Dalgety professed that its reason for discharging Ms. Avina was that Mr. Muth genuinely believed her continued employment would create an unacceptably high risk of injury to herself or her co-workers. Just as in *Western Electric*, Ms. Avina claimed that reason was a mere pretext and that the true reason was that she had been involved in workers' compensation proceedings. Similarly, Ms. Avina demonstrated to Judge Butler's satisfaction that she was capable of continuing her employment with Dalgety without presenting a risk of further injury.

At that point, under the *Western Electric* rule, the burden of proof shifted to Dalgety to show that its "true reason" *really* was Mr. Muth's concern for the risk of injury.

At the Section 132a trial, as well as at the arbitration hearing before it, Dalgety presented extensive evidence on this point. It outlined the many steps taken by Mr. Muth during the nearly two months that he investigated the extent

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[8]The *Western Electric* Court supported this proposition by citing to that part of *Judson Steel* (22 C.3d at 665) wherein the California Supreme Court found the employer's professed reason to be "specious" — in other words, where the employer simply could not convince the Court that its professed reason was its "true reason".

of Ms. Avina's physical impairment, the nature of the jobs she would have to be able to perform, and the safety hazards present in the plant. The record before Judge Butler, like that before the Arbitrator, contained much testimony and other evidence consistently demonstrating that Mr. Muth discharged Ms. Avina for the sole reason that he believed in good faith that her continued employment presented an unacceptably high risk of further injury. No contrary evidence was introduced.

The unanimous opinion of the decision-makers in this case has been that Dalgety established that its true reason for discharging Ms. Avina was that it believed her continued employment to present an unacceptably high risk of injury. Before the Section 132a trial, the impartial Arbitrator unequivocally ruled this to be the true reason. After the Section 132a trial, even Judge Butler was convinced:[9]

> The reason for the discharge, as testified to by Brian Muth, is that "there was no work available which she could perform without the risk of either reinjury o[r] further injury."
>
> He (Muth) came to this conclusion because of (a) the degree of disability contemplated by the amount of the compromise, (b) the opinions of Drs. Dohn and Story regarding the degree of handicap, ([c]) the analysis of the work environment and tasks and, (d) the history of several other industrial injuries.[10]

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[9]No doubt the Judge had in mind the familiar rule of *Lamb v. WCAB*, 11 C.3d 274 (1974), that "[a]s a general rule, the board 'must accept as true the intended meaning of [evidence] both uncontradicted and unimpeached.' " *Id.* at 281.

[10]The Employer has constantly excepted to Judge Butler's characterization of the record to the extent that it indicates that Mr. Muth considered Ms. Avina's history of industrial, but non non-industrial, injuries. Uncontroverted and unimpeached testimony established that Mr. Muth was concerned with Ms. Avina's entire medical condition and with all of her prior injuries, regardless of whether they were industrial or non-industrial. In fact, Mr. Muth specifically testified that he did not treat or consider the two types of injuries in different ways and that he was concerned only with evaluating her medical condition and the extent of her physical impairment, regardless of the causes of her difficulties.

* * *

> *Mr. Muth's motives are accepted by me as true, and genuinely considerate of Ms. Avinas' [sic] condition.*

(Exhibit "A-2" at 1-2 (emphasis added).)

In short, Judge Butler expressly determined that, as a factual matter, the 'true reason' for the discharge was Mr. Muth's concern for the risk of injury. Despite Ms. Avina's protests, this finding was left untouched by the Board. Ms. Avina now can advance no cogent reason for reversing the Board on this factual point[11] and, indeed, does not even contend that Dalgety's good-faith belief was not genuine. *Western Electric* holds that, in these circumstances, no violation of Section 132a has occurred:

> [The employer'] asserts it discharged [the employee] as there was no work available which she could perform without the risk of either reinjury or further injury. *If this is the true reason [the employer] refused to allow [the employee] to return to work, then there was no Section 132a violation.*

99 C.A.3d at 644-45 (emphasis added).[12]

It is no accident that the courts and the Board unanimously hold a bad motive related to workers' compensation proceedings to be a necessary element of a Section 132a vio-

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[11]This Court's authority is limited to determining whether the Board's determination "is supported by substantial evidence". *Judson Steel, supra*, 22 C.3d at 664.

[12]In the past, the Board has abided by the rule that actual motive — what the employer genuinely believed — is the central consideration in determining whether Section 132a has been violated. *E.g., Armstrong v. WCAB*, 45 C.C.C. 1235, 1236 (1980), writ denied December 23, 1980 (no violation of Section 132a expressly because "the termination was not *motivated* by compensation considerations but related to unsatisfactory job performance" (emphasis added)); *See Jones v. WCAB*, 42 C.C.C. 842 (1977), writ denied October 17, 1977 (no Section 132a violation where true reason for discharge was employer's genuine belief that employee was guilty of excessive absenteeism; reflects no inquiry into whether employee was in fact excessively absent).

lation. Ms. Avina's view of the law would expand Section 132a into a general remedy for all employees who are disgruntled with the treatment they receive from their employers, *regardless of reason*.

Suppose, hypothetically, that an employee who has sustained an industrial injury is suspected of theft. He protests his innocence, but the employer genuinely believes him guilty and terminates his employment. The employee files a claim under Section 132a, alleging that the theft charge was a mere pretext concealing punishment for his resort to workers' compensation proceedings. At the Section 132a hearing, the Judge is convinced that the employer genuinely believed the employee guilty, discharged him for that reason alone, and had no thought whatsoever of penalizing him for sustaining an industrial injury or participating in workers' compensation proceedings. However, the employee proves to the satisfaction of the judge that he really is innocent and thus that the employer's belief was mistaken.

What result? The hypothetical precisely parallels the facts in the instant case as seen by Judge Butler and Ms. Avina; the only difference is that the "true reason" for the discharge in the hypothetical is the employer's genuine belief that the employee committed theft, whereas in the instant case it is Mr. Muth's genuine belief that Ms. Avina's continued employment would present an unacceptably high risk of injury. Under Ms. Avina's view of *Western Electric* and Section 132a, therefore, the hypothetical employer must be held to have violated Section 132a!

Similar hypotheticals can be generated involving *any* reason on which employers acting in good faith base discharges or other discipline. Under Ms. Avina's view of the law, employees who were discharged by employers who believed in good faith that they were guilty of absenteeism, insubordination, poor performance, negligence, or a host of

other failings would nevertheless be entitled to reinstatement, back pay, and a 50% penalty if they had ever had an industrial injury and could convince the judge in a Section 132a hearing that they actually were *not* guilty of improper conduct.

In short, *Ms. Avina's view of the law would make the WCAB the place to which every employee in the State of California who has ever had an industrial accident could appeal each and every adverse employment decision made by every employer, regardless of reason.* To state the proposition is to refute it. Section 132a makes no sense at all unless it requires an improper motive to be violated.

Under *Judson Steel, Western Electric*, the Board's cases, and common sense, therefore, Section 132a is violated only if the employer's "true reason" for the discharge was unlawful. In the instant case, as the impartial Arbitrator and Judge Butler independently determined, there is no question that Dalgety's "true reason" for terminating Ms. Avina was not only lawful, but laudable. Consequently the Board correctly held — and was compelled by law to hold — that no violation of Section 132a occurred.

V
CONCLUSION

For four reasons, Ms. Avina's challenge to the Board's denial of relief must fail. First, this Court is preempted by federal law from granting Ms. Avina the relief that was denied her in the collectively bargained arbitration process. Second, Ms. Avina is collaterally estopped by the arbitration proceedings from making out the factual elements of her case. Third, the record conclusively establishes that, at the time of her discharge, Ms. Avina's continued employment would have created an unacceptably high risk of injury. Finally, because Section 132a is violated only if an em-

ployer's reason for acting is unlawfully discriminatory, Dalgety's good-faith and genuine belief that a risk of injury existed disposes of Ms. Avina's claims.

Accordingly, Respondent Dalgety Foods, Inc. urges this Court to dismiss the Petition in its entirety, refuse to issue a writ of review, and enter judgment against Petitioner Avina.

DATED: Sept. 4, 1981

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
GEORGE J. TICHY
MICHAEL B. MARGOLIS

By /s/ Michael B. Margolis

Attorneys for Respondent
DALGETY FOODS, INC.

EXHIBIT "A-1".

SUPPLEMENTAL FINDINGS & AWARD AND ORDER.

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant vs. Spiegle Foods, Incorporated, and Mission Insurance Company, Defendant. Case No. 76 SAL 8071, 77 SAL 9360.

The matter having been regularly submitted, WILLIAM R. BUTLER, Workers' Compensation Judge, makes his decision as follows:

FINDINGS OF FACT

1. Defendant, Dalgety Foods, Inc., did on September 6, 1979 discharge Angelina Avina in violation of Labor Code 132(a).

2. One-half of the compensation otherwise recoverable is in excess of $10,000.00 and applicant is entitled to increased compensation of $10,000.00.

3. Applicant is entitled to recover costs and expenses for the prosecution of the Petition in an amount not to exceed $250.00.

4. Applicant is entitled to reinstatement as an employee of Dalgety Foods, Inc. and to reimbursement of all wage loss and work benefits from September 6, 1979.

5. Defendant is entitled to credit against wage loss for all sums earned by Angelina Avina from any source since September 6, 1979.

6. Applicants' counsel has rendered legal services to the applicant in connection with the prosecution of this Petition of at least $2,500.00 which is allowed as a lien against the increased compensation set forth in Findings 2.

Applicants' counsel is also entitled to an additional fee of 25 percent of any amounts payable under Findings 4 and 5 and is allowed a lien in such percentage.

AWARD

AWARD is made in favor of ANGELINA AVINA and against DALGETY FOODS, INCORPORATED of increased compensation of $10,000.00 less $2,500.00 payable to Rucka, O'Boyle and Lombardo; together with reinstatement as a employee by Dalgety Foods, Inc. as set forth in Finding 4; together with reimbursement for all wage loss as defined in Finding 4 and 5 above, less 25 percent payable to Rucka, O'Boyle and Lombardo in accordance with Finding 6 above; together with reimbursement of any work benefits lost; and, of expenses and costs reimbursement for the prosecution of this petition in accordance with Finding 3.

ORDER

IT IS ORDERED THAT jurisdiction be reserved at the trial level to determine the amount of wage loss and credits thereunder pursuant to Findings 4 and 5, upon the filing of a Declaration of Readiness and supporting documentation to establish the same.

ORDER

IT IS FURTHER ORDERED that this matter be referred to the commissioners in care of the Office of the Secretary of the Workers' Compensation Appeals Board for such action as they deem necessary, inasmuch as the Petition for increased benefits has been granted, and inasmuch as the Petition for prosecution was abated pending determination of the Petition here in question; such abatement being at the request of the parties. The Petition requesting prosecution is for criminal violation of Labor Code Section 132(a) and, therefore, referred to the Commissioners.

WRB:db

/s/ William R. Butler
WILLIAM R. BUTLER
WORKERS' COMPENSATION JUDGE

DATE: March 3, 1981

Served on All Parties by Mail on the Official Address Record.

By: /s/ Deena L. Briggs

EXHIBIT "A-2".

OPINION ON DECISION.

Case No. 76 SAL 8071, 77 SAL 9360.

Angelina Avina vs. Spiegl Foods, Inc., and Mission Insurance Company.

Judge: William R. Butler.

Injury: 7-19-76 & 3-1-68 to 7-19-76.

This Petition was of greater than ordinary factual and legal complexity and difficulty. Therefore, I have awarded extraordinarily large fees, i.e., 25 percent of the recovery.

I am of the opinion that there is direct controlling authority, binding on me and compelling this decision when the facts as I understand them exist. That authority is the holding in *Western Electric Company vs. Workers' Compensation Appeals Board*, (Lahoma Kay Smith) *99 CAL APP 3d 629; 44 CCC 1145*. The court held as follows:

"Western asserts it discharged Smith as there was no work available which she could perform without the risk of either re-injury or further injury. If this is the true reason, Western refused to allow Smith to return to work, then there was no Section 132(a) violation . . .

However, if Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself, then the Board could properly draw an inference of prohibited discriminatory action by Western, unless Western can otherwise demonstrate to the contrary."

The reason for the discharge, as testified to by Brian Muth, is that "there was no work available which she could perform without the risk of either re-injury of further injury."

He (Muth) came to this conclusion because of (a) the degree of disability contemplated by the amount of the com-

promise, (b) the opinions of Drs. Dohn and Story regarding the degree of handicap, (d) the analysis of the work environment and tasks and, (d) the history of several other industrial injuries.

Applicant demonstrated by the fact of her return to work for several months that she was capable of performing her work. After the non-work related incident, she was released by Dr. Story without restriction. Dr. Story testified that the opinion he gave regarding the factors of disability, upon which the case was settled, was predictive of an inability to do the work without the development of severely disabling symptoms, and was not a prophylactic restriction to prevent further injury. He further testified that the fact of successful performance of the work for several months demonstrates he was in error at the time of rendering his earlier opinion.

This is consistent with his later release to work without restriction. The Defendants have not demonstrated to the contrary. I therefore draw the inference of prohibited conduct.

As to the impact of the grievance procedure and arbitration, the position of the Defendant that as to factual matters, the doctrine of collateral estoppel applies, they are correct, but as to the question of demonstration before the Board, that she could have returned to work and performed her job without risk of further injury or re-injury, that issue was not before the arbitrator. The only issue there was, was the determination of whether or not there was a violation of the collective bargaining agreement. There was found to be none.

There was no determination made of whether or not the discharge was in violation of Labor Code 132(a), nor could there be.

I would point out to the parties several matters which I believe pertinent.

Labor Code 132(a) does not require a bad motive. Mr. Muths' motives are accepted by me as true, and genuinely considerate of Ms. Avinas' condition. I also assume the genuine motives of Ross Barnett, George Wallace, Orval Faubus, and the Board of Education of Topeka, Kansas in the early school discrimination cases.

The insurance carrier should have kept Dalgety better informed. For instance, Dr. Rowlans' opinion was not brought to Mr. Muths' attention, had his attention been so directed, he could have asked those questions of Dr. Story (or Dohn) which were asked of the doctor only at the hearing on the Petition, and probably averted this trial.

It is easy to sound critical of Mr. Muth, and no such criticism is intended. He has no medical, nor engineering expertise, and I assume no legal expertise, and certainly not of the level of a certified specialist in Workers' Compensation. This field of law, like all other, has its own jargon, and the subtle but very real distinction between prognostication of an expected inability to perform certain tasks, and a restriction imposed by medical advice, to refrain from those same tasks in order to prevent further harm, could not only fail to impress him with the need to investigate what the basis of that opinion is, it could easily escape the attention of anyone not faced with immediate problems, and also cognizant that there is a difference.

Both are compensible, and equally so, so that the ramifications of the doctors opinions escaped counsel when the case was settled.

One "unjust" result here is compelled by law. The compromise cannot be now reopened; I do point out, however, that had the case been resolved by trial or stipulated rating, a Petition to Reopen and Reduce would now lie.

I also strongly recommend to Defendant Dalgety that in the future it keep its insuror well informed as to the actual

return to work of its employees and the level of work they are performing so that such facts can be brought to the attention of counsel and the physicians upon whose opinion the Board must rely, and to whom such information would be invaluable.

The contentions raised by Mr. Margolis in his letter of February 20, 1981 are met by the Western Electric case relied on by me. If he is correct as to the law, he must convince the Court of Appeal to change the Western Electric decision or to distinguish this case. His issues were raised and are preserved, but I find the Court of Appeals decision binding on me.

/s/ William R. Butler
WILLIAM R. BUTLER,
WORKERS' COMPENSATION JUDGE

WRB:db

EXHIBIT "A-3".

MINUTES OF HEARING and
SUMMARY OF EVIDENCE.

State of California, Department of Industrial Relations, Division of Industrial Accidents.

Workers' Compensation Appeals Board.

Angelina Avina, Applicant vs. Spiegl Foods, Inc., and Mission Insurance Co., Defendants. Case No. 76 SAL 8071, 77 SAL 9360.

Place and Time: SALINAS, February 5, 1981, 9 a.m.

BUTLER, W.C. Judge.

Reporter: White.

Appearances:

Applicant present

BEAUZAY, HAMMER, EZGAR, BLEDSOE & RUCKA (N. Michael Rucka appearing), attorneys for applicant

SALLY GUTIERREZ, Spanish interpreter

LITTLER, MENDELSON, FASTIFF & TICHY (Michael B. Margolis and George J. Tichy II appearing), attorneys for defendant Dalgety Foods, Inc.

Witnesses:

Gilbert Q. Lopez (Appl)
Bessie Shimmon (Appl)
Brian Muth (Appl)
Angelina Avina (Appl)
Stephen D. Storey (Deft)
Gilbert Q. Lopez (Deft)
Brian Muth (Deft)
Ruby Mae Bandura (Deft)
Sophie Arias (Deft).

Exhibits:

Appl. Ex. 6: (Renumbered, previously Deft. Ex. H) Transcript of arbitration proceedings

Board Ex. X: Reports of W. Porter Forcade, M.D., Stephen D. Storey, M.D. & John R. Hayes, M.D.

DISPOSITION: The matter will stand submitted.

SUMMARY OF EVIDENCE

GILBERT Q. LOPEZ was called as a witness on behalf of applicant, sworn, and testified substantially as follows:

He is the personnel manager at Plant 10 for Dalgety. He has had that position for not quite two years. Before being personnel manager he was a line foreman for six to eight months. He does not recall ever having supervised Mrs. Avina when he was a line foreman.

He knew the standard of work required and knew the routine and policy regarding warnings for substandard performance. When the decision to terminate Angelina Avina was made he was the personnel manager. The decision was made or communicated to him by Brian Muth. He does not recall the contents of the conversation. Mr. Muth's position was safety director, and also did some work in personnel.

The witness does not recall whether or not he reviewed Angelina Avina's personnel file at the time of her dismissal. He was told by Mr. Muth to terminate. The instructions were oral. The letter of termination was prepared by Mr. Muth for Mr. Lopez's signature.

He recalls that there was concern that Mrs. Avina might hurt herself further.

The witness was not employed by Dalgety when Angelina Avina returned to work in January or early '79. He does not know of any absences between January and July of '79. He had checked the file, but he has no recollection of any such contents.

He thinks the termination may have been discussed with Angelina Avina. This testimony is in conflict with his deposition, lines 20 and 21, page 11.

The witness was referred to Exhibit 2 of the Batterson deposition. This is the letter that was prepared by Brian Muth for Mr. Lopez's signature.

He was referred to Exhbiit 2 to the deposition of Brian Muth. His recollection is refreshed, that the request for examination by Dr. O'Neil was not done.

He believes there were discussions with Brian Muth before the decision to terminate was made. He does not know what work Angelina Avina did after February '79 as compared with the job she did before her injury. He was not aware of any restrictions on her work capacity.

BESSIE SHIMMON was called as a witness on behalf of applicant, sworn, and testified substantially as follows:

She is a registered nurse working as an occupational health nurse for Dalgety, and before that at the predecessor Spiegl Foods at Plant 10.

She deals with employees for sickness or injury, and Mrs. Avina was one with whom she dealt. She knows of the return-to-work in September and no restrictions were imposed at the time of the return to work.

She knows that the applicant continued to work until on or about July 10, 1979. She recalls no records of lost time between January and July of '79.

In August of '79 she wrote to the doctor (Storey) about work restrictions. She was referred to Exhibit 4 of the Batterson deposition. Dr. Storey did preclude working in cold.

She does not recall any on-the-job injury after January '79, but is aware of an off-the-job injury in July of '79.

There were only two inquiries made of Dr. Storey. One was her letter of August 8th; it was written because of the non-industrial back injury which was brought to the witness's attention. She had seen an excuse from Dr. Storey taking the applicant off work with a back injury. She later saw a release for return to unrestricted work. She then requested further clarification, but is very unsure as to the dates particularly as they relate to the date of September 6th. She had no conversation with Mrs. Avina. She may have been asked about Mrs. Avina's ability to return to work after the July '79 injury.

The signature on the bottom of the Exhibit 4 of the Batterson deposition is her emergency medical technician, and that person assists the witness.

She did not have authority to authorize the return to work or termination of Angelina Avina.

BRIAN MUTH was called as a witness on behalf of applicant, sworn, and testified substantially as follows:

He is the Director of Industrial Relations for Dalgety. He has supervision over Plant 10. In 1979 he was the safety manager for Plant 10. His background is in personnel management and safety administration. He is not an engineer, nor is he medically trained. In the area of medical and engineering matters he has to rely on properly trained experts.

He became aware of Mrs. Avina's problem because a copy of the Order Approving Compromise and Release crossed his desk. The size of the sums drew his attention, and he called personnel and the medical facility to investigate the nature of the problem. At this time he did not have Mrs. Avina's industrial medical file, it being in the possession of the insurance carrier. He received it several weeks later, probably more than 2 and less than 4.

He had immediate access to her personnel file, and he reviewed it early in the process of investigation. No reprimands nor warnings were noted in '79, and no restrictions were indicated in the file. After discussion with the insurance carrier he concluded that the degree of disability contemplated by the Compromise and Release was about 62%, which related to a degree of disability substantially the equivalent of a restriction to semi-sedentary work.

He did not discuss with the carrier the distribution of the Compromise and Release between past and future medical expenses or costs. He was aware of the degree of the rating before he got the doctors' files. He was informed by the insurance carrier that the case was compromised in that it could have rated as high as 83% permanent disability.

He started to investigate, but does not recall whether he saw Dr. Storey's release as early as July of '79. He also relied on conversations with Bess Shimmon on that relating to medical records of some 7 or 8 injuries, primarily falls, starting about 1972. She also indicated she was aware of complaints of pain and discomfort made by Angelina Avina since about March of '79.

He never directly supervised Mrs. Avina, nor knowingly observed her in her work.

There is no policy of the company to terminate employees with semi-sedentary restrictions. The report limiting her to semi-sedentary work was not in the company personnel file when the Order Approving Compromise and Release came.

He did not discuss the matter with Dr. Storey. He requested no separawte opinion from Dr. Storey's office regarding the release.

He drafted the letter that went out over Mr. Lopez's signature. In coming to his conclusions he paid particular attention to the opinion of Dr. Dohn and Dr. Storey, and

his particular concern was about falling and the potentiality for injuring not only herself but others.

. . . . was present during the arbitration testimony. He recalls the "no ...riction" report from Dr. Storey, but relied on his earlier opinion.

. . . . witness was referred by the W.C. Judge to the Collective Bargaining ....ement wherein there are certain job descriptions. Three of them .... read to the witness inquiring why these jobs would be beyond the physical capacity of Angelina Avina. One is the job of Wrapper Feeder, ... that job does require tending of the machine in the event of minor .... functions, which description is not contained in the Collective Bargaining Agreement, and that particular portion of the work would .... beyond his concept of her disability. He is not familiar with .... job of a Raw Product Checker. He did not consider assignment .... a Lab Worker. He believes the Butter Sauce Dispenser job is not ....ne at the Plant 10.

. . . . was referred to Exhibit 1 to the Batterson deposition. This document was prepared by Corina Coloma, who was payroll clerk in Personnel. The reason entered there for termination was entered without instructions from Mr. Muth. The reasons stated are wrong. The reasons stated in the Lopez letter is an accurate statement for reasons of termination. He was present at the Batterson deposition.

His primary reason for termination is he believed there was a high probability of future injury to Mrs. Avina because of her degree of disability, particularly the probability falls.

ANGELINA AVINA was called, sworn, and testified (through Spanish interpreter Sally Gutierrez) substantially as follows:

She had an accident to her leg in 1976 and was off work for a couple of months, and returned to work at Dalgety doing plate casing in the freezer. This involves packing

small boxes. It is done standing, and involves bending, lifting of the boxes when packed, putting them on a belt; you put 24 small boxes into a big box. It involves twisting and rotating. This is a premium job and is harder than other jobs, and requires you to work rapidly.

Under her surgery in 1978 she never turned down work. She was off work about a year after the surgery. She had a released to return to work when she went back to Dalgety. The released was from Dr. Storey. She returned to her regular work. She did plate casing most of the time, the other times she simply went where the foreman sent her.

After the return to work in 1979 she did the same work that she had done previously. She went up and down stairs both before and after the surgery. She did it without difficulty after the surgery in 1979. She also worked over time.

On July 10th of 1979 she had an injury at Albertson's. Immediately prior to that accident she was doing her regular work. The injury at Albertson's was a slip and fall in the vegetable section. She slipped on water on the floor. The slip and fall was not related to the knee problem. She landed in a sitting position and injured her back, and went to the hospital.

STEPHEN D. STOREY, M.D. was called out of order by defendants, sworn, and testified substantially as follows:

He last saw Angelina Avina in January 1980, but ordered a prescription refilled in October 1980.

She has degenerative arthritis. He was the operative surgeon on the knee. She had other complaints, including back pain, wrist pain from a fracture, and complaints of right ankel pain.

He recalls the release of September 1976. Since then he has seen a film of her job and a motion analysis. He feels that she scould do these kinds of work from 10 days to 2

weeks, but believed they could not be done on a permanent full time basis, or it would result in an increase of symptomatology to a level in which she could not perform the work.

He did not believe the restrictions were necessary as a prophylactic measure, but was of the opinion that the applicant would be unable to perform the regular task of her work without the production of disabling symptoms. The fact of her actual return to the performance of that work for a period of six to eight months and performing it without the increase of symptoms, he believes, demonstrates that he was not correct in his conclusion that she would be unable to do so.

ANGELINA AVINA was recalled to the stand and continued testifying substantially as follows:

She received a release to return to work from Dr. Storey after the fall at Albertson's. The release was without work restriction. She reported to the office of Dalgety and gave the slip to Corina and Jessie. She was told to report Monday, and was asked which shift she wanted, and she selected the night shift. She chose that shift because she could get more hours and more money. She knew what shift she was to return to but did not know the job assignment. At that time she felt able to do any job in the plant.

Corina told her to wait, and called the nurse while she was at the office. The nurse told Corina to look in the records and there was a discharge notice there. The letter was read in Spanish to the witness and it thanked her for her employment with Dalgety and told her there was no work for her.

She has found other work, but didn't find it immediately. She is now working at But Antle's in lettuce trimming for salad. She found the job there in May of 1980. It involves

trimming and putting the lettuce on a belt. It is a standing job involving twisting, turning and pushing the lettuce. She works with a knife. The job is similar to what she did at Dalgety except the freezer at Bud Antle's is colder. Her legs are not causing her trouble in this job, her back is not causing her trouble, and her arms are not causing her trouble in this work.

She is not working at Bud Antle now because the season is over. She did have an accident in October and lost some time when she injured her left little finger. She has been called back and will return to work in the new season.

The conversation with Corina took place on a Friday, about the sixth of September. She saw the document but she cannot read English and it was read to her by Corina.

The fall at Albertson's was in water and not on debris. She has filed a charge with the federal government for discrimination against the handicapped related to accident.

She was present during the arbitration hearing. She was represented by Mel Silver. The hearing was conducted in English.

She has been recalled to Bud Antle but the date is not set. By the time she was released for work from the finger injury the season was over.

Applicant rests.

MR. MARGOLIS: Your Honor, at this point we have several motions we'd like to make. The first is, we'd like to move to dismiss the application for increased benefits under Section 132(a) on the grounds that the relief sought has already been determined by the arbitration proceeding, and no appeal of that decision from that proceeding has been sought within the period of time set forth by the California Code of Civil Procedure.

JUDGE: Denied. For the record, counsel, that's tantamount for motion for summary judgment or dismissal before the Board; it's my belief that a decision on the merits has to issue rather than a dismissal at this point. It doesn't reflect on the merits of your contention, merely that that's not the proper remedy.

MR. MARGOLIS: Your Honor, we would contend that it is the proper remedy, given the state of the record. However, I'd like to make a second motion. That motion is that the application be dismissed, or if you like, we be granted summary judgment on the grounds that the matter herein is preempted by federal labor law, as much as the subject of this dispute has already been resolved in collective bargaining process.

JUDGE: Counsel, your record is preserved on that. I am denying the motion because this Board, under the California State Constitution, cannot rule on the constitutionality of the acts vesting jurisdiction in the Board. I do not intend to rule as to the merits of the motion, and it is denied.

MR. MARGOLIS: Our third and final motion at this time is the application be dismissed and/or summary judgment granted because the factual issues in this proceeding have already been determined in the arbitration proceeding, and res judicata requires that the same rule be obtained.

JUDGE: That motion is denied. I don't believe the issues are the same, and on that in particular, counsel, I'm relying on "Judson Steel."

MR. MARGOLIS: I'd also like to make one final motion, for dismissal or summary judgment based on the collateral estoppel, or the preclusion of the factual issues in this matter as opposed to the legal defect.

JUDGE: That motion will be deferred. I'll defer ruling on it, and I believe that that may go to specific issues but not to the entire case, and I want to consider that carefully. I'm concerned about it.

GILBERT Q. LOPEZ was recalled by defendants and testified substantially as follows:

Shown Exhibit A, page 73, the job of Butter Sauce Dispenser does not exist at Plant 10. Laboratory Worker shown at page 70 requires the passage of a written test and bi-lingual ability. The job of Raw Product Checker requires a written test and bi-lingual ability.

Mrs. Avina was a Bracket 5 employee. There are a number of different jobs in Bracket 5. Employees are required to be able to perform all jobs listed on page 79, other than the premium jobs, to remain employed in a Bracket 5. Premium jobs have to be bid on by seniority and ability.

BRIAN MUTH was recalled by defendants and testified substantially as follows:

He is familiar with the practice in the industry under the Collective Bargaining Agreement.

The applicant worked in the general labor classification, Bracket 5.

The witness reiterates that the Order Approving the Compromise and Release brought the problem to his attention but was not the basis of discharge. His basis for the discharge was his view of the job analysis and the disability indicated by the physicians. He determined the degree of permanent disability by talking to the carrier, and as to what factors were involved in the Compromise and Release. He was told it was based on 62%. He checked the plateau guidelines probably after talking to Mrs. Avina, but he is not positive.

He asked the nurse to set an exam with Dr. O'Neil. This was not done because she was already under the care of Dr.

Storey. He reviewed Dr. Dohn's report of March 5th, 1979. He reviewed the plateau guidelines, including the definition of semi-sedentary work. He could not assign work in a semi-sedentary category to the witness.

Termination did not take place immediately because of one, the report of the fall in the super market, and two, the request for review by Dr. Storey because of the fall.

He investigated the off-the-job incident just as he would on the job to determine whether or not there was an impairment. He asked Mrs. Shimmon to write a letter describing the job. He was referred to Defendant's B. He saw the letter from Dr. Storey to Bess Shimmon; it added information about the back abnormality. he later learned the abnormality was congenital. It was taken into consideration with the other accidents and conditions, particularly where Dr. Storey expressed the opinion that it would be impossible and possibly dangerous for Mrs. Avina to reach across a conveyor belt.

The description of the job by Mrs. Shimmon is accurate but incomplete. Basically, it touches the highlights.

He saw the release without restriction of September 6th from Dr. Storey, but because of the previous narrative report he did not accept that opinion.

The applicant's history involved primarily fall type injuries. He was concerned about future falls being more probable, particularly in view of the fact that there are certain hazards in the plant, such as hoses and water which cannot be eliminated. He was also concerned about the aggravation by cold, but in particular the problem relating to falls most concerned him, though he was aware of the job analysis relating to the number of repetitive motions of the arms and wrists.

He is familiar with the broccoli line. There are wooden stairs there which are frequently wet, and the jobs involve wielding a knife; the carrot line has a shrouded knife. There is a conveyor, and a person falling on it could be pulled towards the knife.

He was referred to Cordray's analysis of the hand and arm motions, and while aware of them and they being of some concern, they were not primary.

Dr. Dohn's letter referred to a loss of right handed grasping power of a substantial nature, and that indicated to the witness that there was a hazard of the applicant being unable to retain a knife in falling or having a weakened grip increasing the hazards of a probable fall.

He discharged her because her physical impairments made her a high risk of further injury or injury to others. There is a company policy not to assign work to a person who is impaired if so doing creates an unacceptably high risk of injury.

There is a lot of water around the plant and there is a safety problem relating to debris and hoses. Statistically, a fall while working on the level ground is more frequent than a fall from a height.

Bess Shimmon's letter does not refer to the back injury itself.

He does not know the order of events of the inquiry on the ability to work. The Cordray document was prepared on or about October 18, 1979.

He had received complaints that Mrs. Avina complained of pain and discomfort on the job and had asked to be moved to a more comfortable work situation.

He was aware there was a time loss between the surgery and her return to work, and is aware that she continued to work for some time subsequent to the injury and taking the

time off, and he is aware she worked between the injury and taking time off for the surgery.

He has reviewed material relating to the scope of the numerous falls.

RUBY MAE BANDURA was called as a witness on behalf of the defendants, sworn, and testified substantially as follows:

She is employed at Dalgety as a floor leader. She has been so for 15 years, and has worked at Dalgety since 1955. She knows Angelina Avina and has observed her work performance. She is a slow worker, one of the slower 3 to 4 workers whom she supervises. She has received complaints from foremen about Angelina's slowness, and complaints from other workers.

The asparagus pack involves primarily straightening, weighing, checking, and wrapping. Angelina could be used on any of the general production jobs on the asparagus pack other than the wrapper. She used her primarily straightening.

She supervised Mrs. Avina off and on for about 15 years.

EXHIBIT "B".

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION.

Case Nos. 76 SAL 8071, 77 SAL 9360.

Angelina Avina vs. Dalgety Foods, Inc.

Judge: William R. Butler.

Injury: 7-76 & From 3-1-68 to 7-19-76.

Defendant, Dalgety Foods, Incorporated, by timely Petition requests reconsideration of the supplemental Finding and Award entered by me on March 3, 1981. A Stay of Execution is requested, and a transcript has been ordered.

In general, the petition accurately reflects the evidence and the issues, but is not complete in that it does not refer to the testimony of Stephen D. Storey, M.D., upon whose testimony I placed considerable weight.

Of the issues presented, the most crucial is my interpretation of the language in *Western Electric Company vs. Workers' Compensation Appeals Board, (Smith) 99 CA 3d 629 (1979)*. Absent this opinion of the Court of Appeals and my analysis of it, I would have found for the Defendant. The case is virtually indistinguishable from the case at bar.

The Court of Appeals held:

> "Western asserts it discharged Smith as there was no work available which she could perform without the risk or either re-injury of further injury. If this is the true reason Western refused to allow Smith to return to work, then there was no Section 132(a) violation. . .
>
> However, if Smith can demonstrate she could have returned to work without risk of re-injury or further injury to herself, then the Board could properly drag an inference of prohibited discriminatory action by Western, unless Western can otherwise demonstrate to the contrary."

Grammatically, this phrase could have either of two antecedents. It could mean that the employer could demonstrate that its discharge really was based on its belief which was held in good faith, or it could mean that the employer could demonstrate that there was, in fact, an unreasonable risk of re-injury. I find the second meaning more logical in that the employer would have previously demonstrated its belief in the unacceptable risk or the problem of actual ability to return to the work would not have arisen.

I, therefore, concluded on the basis of applicants' return to work, her performance thereof, and Dr. Storey's testimony, that the work did not involve a risk of re-injury, and that while the employer believed it did at the time of discharge, the employer was erroneous in that decision, and that Ms. Avina, in fact, does not present such risk.

If counsels position is correct as to the meaning of this case, then the ability of the applicant to demonstrate after the fact of discharge, that she could perform the work, is meaningless.

With respect to the effect of the arbitration proceeding, and the assertion that res judicata applies, I believe petitioner is in error. First, the parties are not the same. The parties to an arbitration are the Union and the Employer. The employee is a beneficiary of such action but is not a party.

Secondly, the issue before the arbitrator clearly differed from that before me. The contract was violated, if at all, at the time of the discharge. No question was before the arbitrator as to the applicants right, under "Western Electric" to demonstrate after the fact, that she could do the work. The only apparent issue before the arbitrator was whether or not Dalgety discharged her for the reasons stated, and were those reasons valid under the contract with the Union.

Thirdly, the arbitration decision is not a decision of a Court of Record.

Footnote 51 to the petition correctly characterizes Mr. Muth's testimony; however, I did not consider it significant in that the industrial injuries were a significant part of the basis of Mr. Muth's action, the discharge is not "apportionable".

At Page 24 of the petition, counsel poses a hypothetical question respecting theft. I do not have the citation before me, but recall a recent remand by the Court of Appeal to the Workers' Compensation Appeals Board requiring the Board to determine in fact the guilt or innocence of a person accused of a crime by the employer.

As to the arguments on Federal Preemption, I am of the opinion that this issue could not be resolved by me and did not rule on the matter; the issue was raised in a timely manner and is preserved.

It may be meritorious, but I believe beyond the authority of the trial level Workers' Compensation Judge.

COMMENT

I do not consider the language of Western Electric to necessarily be wise. I consider it binding. Absent that specific authority, I would have found no violation of 132(a). Given the Western Electric decision, the mandate of Labor Code 3202 for liberal construction and the rubric that if the evidence reasonably supports an inference in favor of an injured worker, that inference should be drawn. I believe the award complained of was compelled, and is supported by case law and substantial evidence in the form of Dr. Storey's opinion and the actually demonstrated work capacity.

RECOMMENDATION

I respectfully recommend that the Petition for Reconsideration be denied.

/s/ William R. Butler
WILLIAM R. BUTLER,

WORKERS' COMPENSATION JUDGE

WRB:db

DATE:

Served on Parties by Mail as Shown on the Official Address Record.

By: /s/ Deena L. Briggs

Rucks, O'Boyle and Lombardo
245 W. Laurel Drive
Salinas, CA 93906

Littler, Mendelson, Fastiff & Tichy
2049 Century Park East, #1660
Los Angeles, CA 90067

EXHIBIT "C".

OPINION AND ORDER GRANTING RECONSIDERATION and DECISION AFTER RECONSIDERATION.

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant, vs. Spiegle Foods, Incorporated, and Mission Insurance Company, Defendants. Case No. 76 SAL 8071, 77 SAL 9360.

On March 30, 1981, defendant Dalgety Foods Incorporated petitioned for reconsideration of the Supplemental Findings, Award and Orders filed March 3, 1981, whereby it was found that it discharged applicant on September 6, 1979, in violation of Labor Code Section 132a, with the compensation otherwise recoverable increased by 50%, and that applicant is entitled to reinstatement and back pay by reason of such violation. Petitioner contends that the workers' compensation judge erred in finding a Labor Code Section 132a violation.

Labor Code Section 132a is interpreted as expressing a policy opposing all discrimination against workers having its basis in an industrial injury. (See *Judson Steel Corporation v. WCAB (Maese)* (1978), 43 CCC 1205, 1211; *Western Electric Co. v. WCAB (Smith)* (1979), 44 CCC 1145; *County of Santa Barbara v. WCAB (Bouslaugh)* (1980), 45 CCC 872, 874.)

In his Report and Recommendation on Petition for Reconsideration, the workers' compensation judge noted as follows:

> "Of the issues presented, the most crucial is my interpretation of the language in [*Smith*, supra]. Absent this opinion of the Court of Appeals and my analysis of it, *I would have found for the Defendant*. The case is virtually indistinguishable from the case at bar." (Em-

phasis added.)

In Smith, the Court of Appeal noted as follows:

> "Western asserts it discharged Smith as there was no work available which she could perform without the risk of either re-injury or further injury. *If this is the true reason [the employer] refused to allow Smith to return to work, then there was no section 132a violation.* 'Section 132a does not compel an employer to ignore the realities of doing business by "reemploying" unqualified employees or employees for whom positions are no longer available.' [*Maese*, supra, at p. 1210.] However, if Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself, then the Board *could* properly draw an inference of prohibited discriminatory action by Western unless Western can otherwise demonstrate to the contrary. (See [*Maese*, supra, pp. 1208-1209].)"
>
> (*Smith*, supra, at p. 1154; emphasis added.)

In his Report and Recommendation the workers' compensation judge noted the following interpretation for the above quoted portion of the *Smith* decision:

> ". . . It could mean that the employer could demonstrate that its discharge really was based on its belief which was held in good faith, or it could mean that the employer could demonstrate that there was, in fact, an unreasonable risk of re-injury. I find the second meaning more logical in that the employer would have previously demonstrated its belief in the unacceptable risk or the problem of actual ability to return to the work would not have arisen.
>
> "I, therefore, concluded on the basis of applicant's return to work, her performance thereof, and Dr. Storey's testimony, that the work did not involve a risk of re-injury, and that while *the employer believed it*

> *did at the time of discharge*, the employer was erroneous in that decision, and that Ms. Avina, in fact, does not present such risk.
>
> "If counsel's position is correct as to the meaning of this case, then the ability of the applicant to demonstrate after the fact of discharge, that she could perform the work, is meaningless." (Emphasis added.)

In the petition, defendant presented a different interpretation to the above-quoted portion of the *Smith* case, arguing as follows:

> ". . . [If] the employee can demonstrate that, in fact, no risk of injury existed, the Board may draw the initial inference that the employer's professed reason for the discharge was merely pretextual and concealed a discriminatory motive. However, if the employer can present sufficient evidence to convince the Board that the '*true reason*' for the discharge really was his (mistaken) belief that a risk of injury existed, then the inference of unlawful motive is overcome. . . ."
> (Petition, p. 18; emphasis added.)

We do not agree with the workers' compensation judge's interpretation of *Smith*, and do agree with petitioner. Moreover, the record reveals that the workers' compensation judge was convinced that, in effect, the "true reason" for the discharge was the employer's belief (albeit possibly mistaken) that re-injury or further injury would result from continued work. That being the case, a Labor Code Section 132a violation should not have been found.

In his Opinion on Decision, the workers' compensation judge noted as follows:

> "The reason for the discharge, as testified to by [the employer's Director of Industrial Relations,] Brian Muth, is that 'there was no work available which she could perform without the risk of either re-injury or further injury.'

> "He (Muth) came to this conclusion because of (a) the degree of disability contemplated by the amount of the compromise, (b) the opinions of Drs. Dohn and story regarding the degree of handicap, (c) the analysis of the work environment and tasks and, (d) the history of several other industrial injuries."

The workers' compensation judge further noted in his Opinion as follows:

> ". . . Mr. Muth's motives are accepted by me as true, and genuinely considerate of Ms. Avina's condition. . . ."

Based on our review of the record, including the foregoing, reconsideration will be granted to find that the employer did not discharge applicant in violation of Labor Code Section 132a.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration filed March 30, 1981, be, and it is hereby, GRANTED.

IT IS FURTHER ORDERED that the Supplemental Findings and Award and Order filed in the above-captioned matters on March 3, 1981, be, and it is hereby, RESCINDED, and the following Supplemental Finding and Orders SUBSTITUTED in lieu thereof as the Workers' Compensation Appeals Board's Decision After Reconsideration.

FINDING OF FACT

1. Defendant, Dalgety Foods, Incorporated, did not discharge applicant on September 6, 1979, in violation of Labor Code Section 132a.

ORDER

IT IS ORDERED that applicant's Petition for Labor Code Section 132a benefits be, and it is hereby, DENIED.

IT IS FURTHER HEREBY ORDERED that applicant take nothing by reason of her Petition for Labor Code Section 132a benefits.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Gordon R. Gaines

[Seal]

I CONCUR.

/s/ C.L. Swezey

I DISSENT.

/s/ Barbara A. Sharon

Dated and Filed at San Francisco, California, May 29, 1981.

Service by Mail on Said Date on All Parties Listed Below at the Addresses on the Official Address Record:

Angelina Avina;
Rucka, O'Boyle & Lombardo;
Littler, Mendelson, Fastiff & Tichy;
Dalgety Foods, Inc.

/s/ David Lee

EXHIBIT "D".

OPINION AND ORDER
DENYING RECONSIDERATION.

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant, vs. Spiegle Foods, Incorporated, and Mission Insurance Company, Defendants. Case No. 76 SAL 8071, 77 SAL 9360.

On June 19, 1981, applicant petitioned for reconsideration of the Appeals Board's Decision After Reconsideration in the above-captioned matters filed May 29, 1981, whereby it was found that dependent employer did not discharge applicant in violation of Labor Code Section 132a. Petitioner contends that such determination is in error and is not supported by substantial evidence.

Based on our review of the record, including the reasons and evidence discussed in our Opinion filed May 29, 1981, which we herewith adopt and incorporate herein, we are persuaded that reconsideration should be denied.

In our Opinion we noted as follows:

> ". . . [The] workers' compensation judge was convinced that, in effect, the 'true reason' for the discharge was the employer's belief (albeit possibly mistaken) that re-injury or further injury would result from continued work. That being the case, a Labor Code Section 132a violation should not have been found."

An employer's protestation of innocence is not a defense in an industrial injury discrimination case unless the trier of fact believes it. Here, the workers' compensation judge believed the employer.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration filed June 19, 1981, be, and it is hereby, DENIED.

WORKERS' COMPENSATION APPEALS BOARD
/s/ Gordon R. Gaines
[Seal]

I CONCUR.
/s/ C.L. Swezey

I DISSENT. (See Dissenting Opinion attached.)
/s/ Barbara A. Sharon

Dated and Filed at San Francisco, California, July 14, 1981.

Service by Mail on Said Date on All Parties Listed Below at the Addresses on the Official Address Record:

Angelina Avina;
Rucka, O'Boyle & Lombardo;
Littler, Mendelson, Fastiff & Tichy;
Dalgety Foods, Inc.

/s/ Brad [illegible].

DISSENTING OPINION

I dissent. I would grant reconsideration in order to affirm the workers' compensation judge's finding of discrimination dated March 3, 1981. There is no question that the employer's action adversely affected applicant's employment, or that the action was taken because of applicant's industrial injury. In light of the factual determination made by the workers' compensation judge there is also no question that the employer's action was a mistake.

The legislature and the higher courts have determined that discriminatory action by an employer against an injured employee is actionable. No provision has been made for a defense of "mistaken belief".

/s/ Barbara A. Sharon
BARBARA A. SHARON, Commissioner.

Dated and Filed at San Francisco, California, July 15, 1981.

Service by Mail on Said Date on All Parties Listed Below at the Addresses on the Official Address Record:

Angelina Avina;
Rucka, O'Boyle & Lombardo;
Littler, Mendelson, Fastiff & Tichy;
Dalgety Foods, Inc.

/s/ Brad [illegible].

[Seal]

VERIFICATION

I, MICHAEL B. MARGOLIS, state:

I am an associate in the firm of Littler, Mendelson, Fastiff & Tichy, attorneys of record in this action for Respondent Dalgety Foods, Inc. Said party is absent from the County of Los Angeles, California, where I have my office, and I make this verification for that reason.

I have read the foregoing Answer and Brief in Opposition to Petition for Writ of Review, am informed and believe the facts therein to be true, and on that ground allege that said facts are true.

Executed this 4th day of September, 1981, at Los Angeles, California. I declare under penalty of perjury that the foregoing statement, consisting of this page only, is true and correct.

/s/ Michael B. Margolis
MICHAEL B. MARGOLIS

PROOF OF SERVICE BY MAIL

I, Sheron McDonald, declare that I am a resident of the United States and am employed in the City and County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action. My business address is 2049 Century Park East, Suite 1660, Los Angeles, California 90067.

On September 4, 1981, I served the within

ANSWER AND BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF REVIEW

on the parties involved by placing a true copy thereof in a sealed envelope, with postage thereon prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Alfred Lombardo, Esq.
Rucka, O'Boyle & Lombardo
245 West Laurel Drive
Salinas, California 93906

Honorable William R. Butler
Workers' Compensation Appeals Board
21 West Laurel Drive, Suite 69
Salinas, California 93901

Workers' Compensation Appeals Board Reconsideration Department
455 Golden Gate Avenue
San Francisco, California 94102

Mission Insurance Company
P. O. Box 5219
San Jose, California 95150

State Compensation Insurance Fund
P. O. Box 759
San Jose, California 95106

Hartford Accident and Indemnity Company

P. O. Box 5086
San Jose, California 95150

I, Sheron McDonald, certify under penalty of perjury that the foregoing is true and correct, and that this document was executed on the fourth day of September, 1981, at Los Angeles, California.

/s/ Sheron McDonald
Sheron McDonald

APPENDIX S.

Reply Brief [by Angelina Avina] (September 10, 1981).

1 Civil 53500

In the Court of Appeal of the State of California, First Appellate District, Division Two.

Angelina Avina, Petitioner, vs. Workers' Compensation Appeal Board of the State of California; Spiegle Foods; Mission Insurance Company; State Compensation Insurance Fund; and Hartford Accident and Indemnity Company, Respondents. WCAB No. 76 SAL 8071, 77 SAL 9360.

To the Presiding Justice and Associate Justices of the Court of Appeal, State of California, First Appellate District, Division Two:

Petitioner, ANGELINA AVINA, files the following reply in response to the answering brief of respondent Dalgety Foods:

I

RESPONDENT'S PREEMPTION AND COLLATERAL ESTOPPEL CONTENTIONS ARE WITHOUT MERIT

Respondent asserts in its answer that federal law invalidates the protections afforded the injured workers of the state by Labor Code §132(a). The validity and constitutionality of the Compensation Act has long been established. *Western Industrial Co. vs. Pillsbury*, (1915) 170 C 686; *Nelson vs. Metalclad Insulation Corp.*, (1975) 44 CA3d 474; 81 AmJur2d workmans compensation, §10, et seq., the power of the states to regulate and enact workers' compensation laws being well established. There is no merit to the respondent's federal preemption argument, nor are the cases cited by respondent on point. The *Oliver* and *Morton* cases cited by the respondent involved situations in which

state law was being invoked to the unfair advantage of employers in an economic struggle against unions; there is nothing in those cases to even remotely suggest that federal law prohibits the states from protecting industrially injured individuals from discrimination.

The gist of the respondent's preemption argument—variously raised elsewhere in the answer under labels "Res Judicata" and "Collateral Estoppel"—is that the respondent's firing of Mrs. Avina was not found to be in violation of the collective bargaining agreement between the respondent and the Teamsters Union and therefore should not be found in violation of Labor Code §132(a). However, the Supreme Court clearly stated in *Judson Steel Corp. vs. WCAB*, (1978) 22 C3d 658, that compliance with a collective bargaining agreement is not a defense to §132(a):

> "[An] Employer may not defend a discriminatory employment practice proscribed by §132(a), on the basis of the provisions of a collective bargaining agreement, for a union may no more bargain away its members' statutory rights against discrimination under the workers' compensation laws then it may bargain away its members' statutory rights, for example, sexual or racial discrimination." *Judson Steel*, supra.

Also, since the arbitrator did not consider the statutory issue, the Workers' Compensation Judge would not be bound by the arbitrator's decision. *Ad Art, Inc. vs. NLRB* (9th Cir., December 9, 1980; as amended January 30, 1981) ___ F2d ___,wherein it was held that the NLRB properly refused to defer to the decision of an arbitrator which did not consider the statutory issue before the NLRB. Application of the same rubric is clearly called for the present case: There is no rule of liberal interpretation that applies to the interpretation of collective bargaining agreements, whereas the protection afforded §132(a) should be liberally construed and

interpreted in a manner that would be most consistent with the policy of granting relief to injured workers (see Labor Code §3202).

It is therefore submitted that the Workers' Compensation Judge, and this Court, are not bound in the interpretation of Labor Code §132(a) by the decision of a labor arbitrator that the employer's conduct did not violate a union contract.

II
ADOPTION OF PURELY SUBJECTIVE TEST AS ARGUED FOR BY RESPONDENT WOULD COMPLETELY EMASCULATE LABOR CODE §132(a) AND LEAVE INJURED WORKERS UNPROTECTED

The cases interpreting Labor Code §132(a), principally *Judson Steel* supra, the leading case by the Supreme Court, recognize that direct evidence of a discriminatory or retaliatory action will be difficult for the employee to show. Rarely will an employer expressly state that it was taking discriminatory action against a worker for having sustained an industrial injury. Therefore it is submitted that the Workers' Compensation Judge, properly under the case law, based his decision that the respondent violated §132(a) on the objective facts and not on the respondent's self-serving statements as to its subjective intent.

The respondent's argument that the use of an objective standard could, conceivably, result in the reinstatement under §132(a) of an employee fired for an alleged theft simply because he coincidentally also had an industrial injury, is typical of the fallacious arguments made by the respondent throughout its answer. Obviously the firing of an employee because of an alleged theft would have absolutely nothing to do with the industrial injury, whereas in the present case there is no question that but for the industrial injury and workers' compensation award the petitioner would never

have been fired; in fact the respondent's own words were that the compensation award "played an important role" in the decision to terminate Mrs. Avina (an even stronger statement as to the role of the compensation award was made in the termination letter to Mrs. Avina, which was an exhibit in the proceedings before the Workers' Compensation Appeals Board). The sophistry and fallacy of the respondent's arguments is perhaps no where clearer than in its contention that Mrs. Avina's subsequent employment at a similar job for a different employer is "irrelevant" to the question of whether she was able to physically perform her former job; common sense obviously dictates the contrary.

The Court is urged to consider where the application of a purely subjective test in the present case places the burden and hardship of the employer's "mistaken belief." Not on the party who made the mistake, whether honestly or otherwise, but on the injured employer who clearly is not responsible for the mistake and is least able to afford it. If Labor Code §132(a) does not protect the worker who but for an industrial injury would never had been fired, who is capable of performing the job, and where a business necessity for the firing has not been shown, §132(a) may as well be written off the books.

III
CONCLUSION

For the reasons stated above, and set forth in the petitioner's Petition for Writ of Review, it is submitted that the Workers' Compensation Judge correctly found the discharge of Mrs. Avina to be in violation of Labor Code §132(a) and that the record lacks evidence of the "considerable substantiality" required to justify the reversal of the Trial Judge. *Garza vs. WCAB*, (1970) 3 C3d 312.

WHEREFORE, it is respectfully requested that the Petition for Writ of Review be granted for the purpose of reinstating the original decision or the Trial Judge.

Respectfully submitted,

RUCKA, O'BOYLE & LOMBARDO

By /s/ Alfred Lombardo
ALFRED LOMBARDO
Attorney for Petitioner

Dated 9/10/81

VERIFICATION

I, ALFRED LOMBARDO, declare:

I am one of the attorneys for applicant, ANGELINA AVINA, that the foregoing document is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of September, 1981, at Salinas, California, 93906.

/s/ Alfred Lombardo
ALFRED LOMBARDO

PROOF OF SERVICE BY MAIL

I, COLLEEN L. JORDAN, declare:

I am a citizen of the United States and a resident of the County of Monterey; I am over the age of eighteen years and not a party to the within entitled action; my business address is 245 West Laurel Drive, Salinas, California, 93906, on September 10, 1981, I served the within REPLY BRIEF by placing same enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Salinas, California, addressed as follows:

Court of Appeals
First Appellate District
350 McAllister Street
San Francisco, CA 94012

I served the within REPLY BRIEF by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Salinas, California, addressed as follows:

Workers' Compensation Appeals Board
Reconsideration Department
455 Golden Gate Avenue
San Francisco, CA 94102

Workers' Compensation Appeals Board
21 West Laurel Drive, Suite 69
Salinas, CA 93906

Michael Margolis, Esq.
2049 Century Park East, Suite 1660
Los Angeles, CA 90067

State Compensation Insurance Fund
P.O. Box 759
San Jose, CA 95106

Mission Ins. Co.
P.O. Box 5219
San Jose, CA 95150

Hartford Accident & Indemnity Co.
P.O. Box 5086
San Jose, CA 95150

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of September, 1981, at Salinas, California, 93906.

/s/ Colleen L. Jordan
COLLEEN L. JORDAN

APPENDIX T.

Order Denying Petition for Writ of Review [by California Court of Appeal] (November 27, 1981).

Court of Appeal of the State of California, in and for the First Appellate District, Division Two.

Angelina Avina, Petitioner, vs. Workers' Compensation Appeals Board of the State of California, et al., Respondents. No. 53500.

W.C.A.B. No. 76 SAL 8071, 77 SAL 9360.

Filed: November 27, 1981.

BY THE COURT:

The petition for writ of review is denied.

Dated: Nov. 27, 1981

[Stamp]
TAYLOR, P.J.

APPENDIX U.

Order Granting Petition for Hearing and Directing Court of Appeal to Issue Writ of Review [by California Supreme Court] (December 23, 1981).

1st Civil No. 53500.

In the Supreme Court of the State of California, In Bank.

Avina v. Workers' Compensation Appeals Board et al.

Filed: December 23, 1981.

Petition for hearing granted and matter transferred to this court and retransferred to the Court of Appeal, First District, Division Two, with directions to issue a writ of review to be heard before that court when the proceeding is ordered on calendar. (see Western Electric, Co. v. Woerkers' Comp. App. Bd. (1979) 99 Cal. App. 3d 629.

BIRD,

Chief Justice

TOBRINER,

Justice

RICHARDSON,

Justice

NEWMAN,

Justice

KAUS,

Justice

BROUSSARD,

Justice

APPENDIX V.

Order Issuing Writ of Review [by California Court of Appeal] (January 15, 1982).

Court of Appeal of the State of California in and for the First Appellate District, Division Two.

Angelina Avina, Petitioner, vs. Workers' Compensation Appeals Board of the State of California, et al., Respondents. No. 53500.

W.C.A.B. No. 76SAL8071, 77SAL9360.

Filed: January 15, 1982.

BY THE COURT:

The Supreme Court having so ordered, let a writ of review issue as prayed for to be heard before Division Two of this court on Tuesday, February 9, 1982, at 10:00 a.m. The writ is to be issued, served and filed on or before January 22, 1982.

Dated: Jan. 15, 1982

[Stamp]
ROUSE, J.
ACTING P.J.

APPENDIX W.

Writ of Review [by California Court of Appeal] (January 15, 1982).

Court of Appeal of the State of California, In and for the First Appellate District, Division Two.

Angelina Avina, Petitioner, vs. Workers' Compensation Appeals Board of the State of California and Speigle Foods, et al., Respondents. No. 1/Civ. 53500.

WRIT OF REVIEW

To the Workers' Compensation Appeals Board of the State of California:

Whereas, *It appears from the verified petition of the above-named Petitioner ___, on file in this Court, that you have exceeded your powers and jurisdiction in that certain proceeding pending before you, hereinafter described*

You, the Workers' Compensation Appeals Board, are hereby notified that the records and proceedings in the matter designated in your files as Claim No. 76 SAL 8071, 77 SAL 9360, *and entitled* ANGELINA AVINA, applicant vs. SPIEGLE FOODS, INC., et al., Defendants., *will be reviewed and heard by this Court on the* 9th *day of* February, *1982, at 10 o'clock A.M., at its court room in the State Building in the City and County of San Francisco, California, and you are hereby commanded to certify and file with this Court on or before* 22nd January 1982, *a full and correct transcript of the records and proceedings in said matter.*

By order of the Court.

Witness, *the Honorable* ALLISON ROUSE, Acting *Presiding Justice of the Court of Appeal of the State of California, First Appellate District,*

Division TWO.

Attest *my hand and the seal of this Court this* 15th *day of* January, *19*82.

CLIFFORD C. PORTER

Clerk of the Court

[Seal]

By D. Ballah

Deputy Clerk

APPENDIX X.

Order Modifying Order Issuing Writ of Review [by California Court of Appeal] (January 19, 1982).

Court of Appeal of the State of California in and for the First Appellate District, Division Two.

Angelina Avina, Petitioner, vs. Workers' Compensation Appeals Board of the State of California, et al., Respondents. No. 53500.

W.C.A.B. No. 76SAL8071, 77SAL9360.

Filed: January 19, 1982.

BY THE COURT:

The order of this court dated January 15, 1982, directing the issuance of a writ of review in the above entitled cause is modified to reflect the return to the writ of review shall be served and filed on or before February 1, 1982

Dated: Jan. 20, 1982

/s/ Rouse
ACTING P.J.

APPENDIX Y.

Opinion and Decision [by California Court of Appeal] (March 25, 1982).

In the Court of Appeal of the State of California, First Appellate District, Division Two.

Angelina Avina, Petitioner, vs. Workers' Compensation Appeals Board of the State of California, et al., Respondents. 1 Civ. 53500.

(WCAB NO. 76 SAL 8071, 77 SAL 9360).

Filed: March 25, 1982.

EXHIBIT 1

This matter is before us by order of the Supreme Court directing this court to issue a writ of review. The order cites *Western Electric Co. v. Workers' Comp. Appeals Bd.* (1979) 99 Cal.App.3d 629.

Petitioner, a long-time employee of respondent Dalgety Foods, Inc., sustained an industrial injury which was compromised by order approving compromise and release for a sum of $22,628.82. On March 8, 1979, after she had received a release to return to work, she returned to work and worked until July 10, 1979, when she sustained a nonindustrial injury due to a fall at Albertson's. On September 6, 1979, Dr. Storey released petitioner to return to work after her nonindustrial injury. Petitioner thereafter returned to her employment to find that she had been terminated. Respondent employer contended that after investigating her case, it had come to the conclusion that "there was no work available which she could perform without the risk of either reinjury or further injury." On May 5, 1980, petitioner found other work at Bud Antles' trimming lettuce, similar to the work she had done for respondent employer, which she has performed without difficulty except for a twisted

finger. She filed a claim under Labor Code section 132a.

On March 3, 1981, the workers' compensation judge found that respondent employer did on September 6, 1979 discharge petitioner in violation of Labor Code section 132a, awarded her increased compensation of $10,000 and ordered that she be reinstated as an employee and reimbursed for all wage loss and work benefits from September 6, 1979. He ruled as follows:

"I am of the opinion that there is direct controlling authority, binding on me and compelling this decision when the facts as I understand them exist. That authority is the holding in *Western Electric Company vs. Workers' Compensation Appeals Board*, (Lahoma Kay Smith) *99 CAL APP 3d 629; 44 CCC 1145*. The court held as follows:

" 'Western asserts it discharged Smith as there was no work available which she could perform without the risk of either re-injury or further injury. If this is the true reason, Western refused to allow Smith to return to work, then there was no Section 132(a) violation . . .

"However, if Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself, then the Board could properly draw an inference of prohibited discriminatory action by Western, unless Western can otherwise demonstrate to the contrary.' "

"The reason for the discharge, as testified to by Brian Muth, is that 'there was no work available which she could perform without the risk of either re-injury of further injury.'

"He (Muth) came to this conclusion because of (a) the degree of disability contemplated by the amount of the compromise, (b) the opinions of Drs. Dohn and Story regarding the degree of handicap, (d) the analysis of the work environment and tasks and, (d) the history of several other in-

dustrial injuries.

"Applicant demonstrated by the fact of her return to work for several months that she was capable of performing her work. After the nonwork related incident, she was released by Dr. Story without restriction. Dr. Story testified that the opinion he gave regarding the factors of disability, upon which the case was settled, was predictive of an inability to do the work without the development of severely disabling symptoms, and was not a prophylactic restriction to prevent further injury. He further testified that the fact of successful performance of the work for several months demonstrates he was in error at the time of rendering his earlier opinion.

"This is consistent with his later release to work without restriction. The Defendants have not demonstrated to the contrary. I therefore draw the inference of prohibited conduct."

The board granted reconsideration, finding that the respondent employer did not discharge petitioner in violation of Labor Code section 132a, ruling on July 14, 1981 as follows: ". . . [T]he workers' compensation judge was convinced that, in effect, the 'true reason' for the discharge was the employer's belief (albeit possibly mistaken) that re-injury or further injury would result from continued work. That being the case, a Labor Code Section 132a violation should not have been found."

Labor Code section 132a provides: "It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment. [¶] (1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because the latter has filed or made known his intention to file an application with the appeals board, or because the employee has received a rating, award

or settlement, is guilty of a misdemeanor and subject to the provisions of section 4553. Any such employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer."

We conclude that the board has concentrated on one paragraph of the Western Electric case and ignored the paragraph which follows, which reads: "However, *if Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself*, then the Board could properly draw an inference of prohibited discriminatory action by Western, unless Western can otherwise demonstrate to the contrary." (*Western Electric Co. v. Workers' Comp. Appeals Bd., supra*, p. 645; see also *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 665.)

The rule of section 3202 that Workers' Compensation laws are to be construed " 'liberally . . . with the purpose of extending their benefits for the protection of persons injured in the course of their employment' " applies. (*Judson Steel Corp. v. Workers' Comp. Appeals Bd., supra*, p. 668.) Although section 132a does not compel an employer to ignore the realities of doing business by "reemploying" unqualified employees or employees for whom positions are no longer available, petitioner, by returning to work and working for over four months without further injury, demonstrated that, despite her industrial injury, she remained competent to perform her job; and respondent employer did not demonstrate to the contrary. After petitioner's non-industrial injury, she was released to return to work without restriction, and it was not until she returned to work that petitioner learned she had been terminated. Under these circumstances, the employer's good faith, albeit mistaken belief, that petitioner could not perform her work without further injury, should not have been given any credence by

the board. (*Western Electric Co. v. Workers' Comp. Appeals Bd., supra*, p. 645; *Judson Steel Corp. v. Workers' Comp. Appeals Bd., supra*, p. 667.)

The board's order of July 14, 1981 is annulled, and the matter is remanded to the board for further proceedings consistent with this opinion.

Miller, J.

WE CONCUR:

Rouse, Acting P.J.

Smith, J.

APPENDIX Z.

Modification of Opinion [by California Court of Appeal] (April 23, 1982).

In the Court of Appeal of the State of California, First Appellate District, Division Two.

Angelina Avina, Petitioner, vs. Workers' Compensation Appeals Board of the State of California, et al., Respondents. 1 Civ. 53500.

(WCAB No. 76 SAL 8071, 77 SAL 9360).

Filed: April 23, 1982.

EXHIBIT 2

BY THE COURT:

The opinion filed on March 25, 1982 is modified as follows:

On page 6, at the end of the first paragraph, add footnote 1. Footnote 1 shall read as follows: "In ruling upon a claim that an employer's conduct violated section 132a, neither the board nor this court is bound by a decision of a labor arbitrator that the employer's conduct did not violate the union contract. (See *Judson Steel Corp. v. Workers' Comp. Appeals Bd., supra*, p. 665, fn. 5.)"

The petition for rehearing is denied.

Dated: Apr. 23, 1982

[Stamp]
ROUSE, J.
Rouse, Acting P.J.

APPENDIX AA.

Order Denying Hearing [by California Supreme Court] (May 20, 1982).

San Francisco, California 94102

MAY 20, 1982

I have this day filed Order HEARING DENIED.

In re: 1 Civil *No.* 53500, Angelina Avina *vs.* WCAB, et al.

Respectfully,

Clerk

APPENDIX BB.

Opinion and Decision after Remittitur [by California Workers' Compensation Appeals Board] (June 27, 1982).

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant vs. Spiegle Foods, Incorporated, and Mission Insurance Company, Defendant. Case No. 76 SAL 8071, 77 SAL 9360.

On March 25, 1982, the Court of Appeal rendered its decision in the above entitled matter, wherein it annulled the Board's Opinion and Order Denying Reconsideration of July 14, 1981, and remanded the matter to the Board for further proceedings consistent with the Court's opinion.

Originally in this matter, the applicant and defendant entered into a Compromise and Release agreement in the gross amount of $22,628.80 with regard to an alleged industrial injury sustained in 1976 to the applicant's lower extremities, back, and left upper extremity. After further proceedings, in a supplemental Findings and Award and Order, filed March 3, 1981, it was found that defendant Dalgety Foods Incorporated discharged the applicant on September 6, 1979 in violation of Labor Code Section 132 (a). Based thereon, the applicant was awarded increased compensation benefits of $10,000.00, costs and expenses for prosecution of the claim not to exceed $250.00, and reimbursement of all lost wages and work benefits from September 6, 1979, less credit to defendant for all sums earned by the applicant from any source since September 6, 1979, less attorney's fees. It was ordered that the applicant be reinstated as an employee of Dalgety Food and that jurisdiction be reserved to determine the amount of lost wages and benefits in the event that the parties could not

otherwise adjust the issue.

On May 29, 1981, the Board rescinded the Supplemental Findings and Award and Order of March 3, 1981, and found that the employer did not violate Labor Code Section 132 (a) in discharging the applicant. In support of its decision the Board stated in part:

> ". . . the record reveals that the workers' compensation judge was convinced that, in effect, the 'true reason' for the discharge was the employer's belief (albeit possibly mistaken) that re-injury or further injury would result from continued work. That being the case, a Labor Code Section 132a violation should not have been found." (page 3)

On July 14, 1981, the Board issued an Opinion and Order Denying (applicant's) Petition for Reconsideration of the May 29, 1981 decision.

The Court of Appeal subsequently determined in its decision of March 25, 1982 in part as follows:

> ". . . Although section 132a does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom position are no longer available, petitioner, by returning to work and working for over four months without further injury, demonstrated that, despite her industrial injury, she remained competent to perform her job; and respondent employer did not demonstrate to the contrary. After petitioner's nonindustrial injury, she was released to return to work without restriction, and it was not until she returned to work that petitioner learned she had been terminated. Under these circumstances, the the employer's good faith, albeit mistaken belief, that petitioner could not perform her work without further injury, should not have been given any credence by the board. (*Western Electric Co. v Workers' Comp. Appeals Bd., supra*, p. 645; *Judson Steel*

Corp. v Workers' Comp. Appeals Board., supra, p. 667.)

The board's order of July 14, 1981 is annulled, and the matter is remanded to the board for further proceedings consistent with this opinion." (*Avina v WCAB* (3-25-82) 47 CCC ___ unpublished opinion.)

On remand to the Board, and after a complete review of the entire record in this matter, the Board believes that no further proceedings are necessary. Therefore, and the Court of Appeal having determined that in effect there was no basis for the Board's prior decisions, the Supplemental Findings and Award and Order of March 3, 1981, will be reinstated.

Finally, while this matter was on remand before the Board, applicant's attorneys petitioned for an increase in attorneys' fees. In the decision of March 3, 1981, applicant's attorneys were allowed fees of $2,500.00 against the $10,000.00 award plus 25% of the applicant's back wages recovery. Applicant's attorney now asserts that the extensive appellate litigation justifies a higher fee, and requests $5,000.00 against the $10,000.00 award with no fee against any wage loss recovery.

After reviewing applicant's attorneys' petition, the Board believes that whereas the workers' compensation judge determined and allowed the original fee, applicant's attorneys' request should be determined by that workers' compensation judge at the trial level. Therefore, after reinstating the decision of March 3, 1981, this matter will be returned to the trial level for further proceedings and decision on the request for increased attorneys' fees.

For the foregoing reasons,

IT IS ORDERED that as the Decision After Remittitur of the Workers' Compensation Appeals Board, the Supplemental Findings and Award and Order, filed March 3, 1981,

be, and the same hereby is, REINSTATED, and this matter returned to the trial level for further proceedings and decision on applicant's attorneys' petition to increase fees.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Gordon R. Gaines

I CONCUR,

/s/ Franklin Grady

C. L. Swezey

Dated and Filed at San Francisco, California, June 22, 1982.

Service by Mail on Said Date to All Parties Listed on the Official Address Record.

/s/ Alfred A. [illegible]

[Seal]

APPENDIX CC.

Report and Recommendation on Petition for Reconsideration [by California Workers' Compensation Judge] (August 10, 1982).

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant vs. Spiegel Foods, Inc. and Mission Insurance Company, Defendant. Case No. 76 SAL 8071, 77 SAL 9360.

Defendant has requested reconsideration of the Award entered by the Comminssioners on June 22, 1982.

I am informed that the Petition was filed in Los Angeles in a timely fashion.

The Petition goes to certain limited issues as to which there has been no judicial determination due to the procedural path and the limitation of review.

The Petition raises 3 issues of affirmative defense and asserts that the Court of Appeal, on review, did not review nor could it review them since the original decision of the commissioner, being as it was, founded on another basis, mooted those issues.

The Court of Appeal, in its review, did not review these contentions, and the Workers' Compensation Appeals Board on remand denied them by operation of law, therefore, they request further reconsideration.

I do not know if this report is necessary or desired, but since at trial I ruled on these issues and the file is now enormous. I do comment on the issues of (1) pre-emption by Federal Law, (2) collateral estoppel, and, (3) substantial evidence.

The issue of Federal pre-emption was raised in a timely manner and preserved. I specifically made no finding on this subject, believing it to be beyond the appropriate ju-

risdiction of the Board at trial level. It appears to have been raised and either not ruled on or mooted at each subsequent stage of the proceedings and has been briefed in full.

The issue of collateral estoppel, I did resolve against Defendants on the following grounds:

(a) non-identity of parties. The parties to an arbitration and grievance are the contracting parties, in this case, the union and the employer and the individual employee is not a party. (However, the "action" is maintained for her benefit).

(b) non-identity of issues, under the ruling of arbitrator, the good faith of Defendants at the time of the discharge was a defense.

(c) the ruling in Western Electric that applicant could show by subsequent events that there was no unreasonable risk of harm.

On the issue of the substantiality of the evidence, I relied on the opinion of Dr. Storey at the trial that there was no such risk of further injury nor was the applicant unable to do such work. I also relied on her testimony of performance at Dalgety up until the off-work fall.

I still express no opinion on the pre-emption issue, except that I do not believe I have that jurisdiction or if I do have it, it should not in a case of this kind be exercised at the Workers' Compensation Judge's level.

I believe I was correct on the collateral estoppel issue and am also of the opinion that the decision of the Court of Appeal was dispositive of this problem.

I believe the decision was based on substantial evidence particularly Dr. Storey's testimony. I also believe that this issue was dealt with by the opinion of the Court of Appeal, although it occurs to me that the disposition of the unresolved defenses may have been what the Court of Appeal

had in mind when they remanded the matter to the Workers' Compensation Appeals Board for further proceedings rather than order the original award reinstated.

/s/ William R. Butler
WILLIAM R. BUTLER,
WORKERS COMPENSATION JUDGE

DATE: August 10, 1982

Served on all parties shown on the address record.

BY: /s/ Deena Briggs
Deena Briggs, Secretary

Rucka, O'Boyle and Lombardo, 245 W. Laurel, Salinas, CA 93906

State Fund, Box 759, San Jose, CA 95106,

Hartford Accidents & Indemnity, Box 5086, San Jose, CA 95150

Littler, Mendelson, Fastiff & Tichy, 2049 Century Pk East, #1660, Los Angeles, CA 90067.

APPENDIX DD.

Opinion and Order Denying Reconsideration [by California Workers' Compensation Appeals Board] (September 16, 1982).

Workers' Compensation Appeals Board, State of California.

Angelina Avina, Applicant, vs. Spiegel Foods, Inc. and Mission Insurance Company, Defendants. Case No. 76 SAL 8071, 77 SAL 9360.

By Supplemental Findings, Award and Orders filed March 3, 1981, it was found that defendant Dalgety Foods, Inc. discharged applicant Avina on September 6, 1979, in violation of Labor Code Section 132a. On March 30, 1981, defendant employer petitioned for reconsideration contending that the workers' compensation judge erred in finding a Labor Code Section 132a violation. By the Appeals Board's Opinion and Order Granting Reconsideration and Decision After Reconsideration filed May 29, 1981, we rescinded the decision of March 3, 1981, and found that applicant was not discharged in violation of Labor Code Section 132a. In our Opinion filed May 29, 1981, we noted as follows:

> "Labor Code Section 132a is interpreted as expressing a policy opposing all discrimination against workers having its basis in an industrial injury. (See *Judson Steel Corporation v. WCAB (Maese)* (1978), 43 CCC 1205, 1211; *Western Electric Co. v. WCAB (Smith)* (1979), 44 CCC 1145; *County of Santa Barbara v. WCAB (Bouslaugh)* (1980), 45 CCC 872, 874.)
>
> * * *
>
> "In *Smith*, the Court of Appeal noted as follows:
>
> > 'Western asserts it discharged Smith as there was no work available which she could perform without the risk of either re-injury or further injury. *If this is the*

true reason [the employer] refused to allow Smith to return to work, then there was no section 132a violation. 'Section 132a does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available.' [*Maese*, supra, at p. 1210.] However, if Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself, then the Board *could* properly draw an inference of prohibited discriminatory action by Western unless Western can otherwise demonstrate to the contrary. (See [*Maese*, supra, pp. 1208-1209].)' (*Smith*, supra, at p. 1154; emphasis added.)

"In his Report and Recommendation [dated April 9, 1982] the workers' compensation judge noted the following interpretation for the above quoted portion of the *Smith* decision:

'. . . It could mean that the employer could demonstrate that its discharge really was based on its belief which was held in good faith, or it could mean that the employer could demonstrate that there was, in fact, an unreasonable risk of re-injury. I find the second meaning more logical in that the employer would have previously demonstrated its belief in the unacceptable risk or the problem of actual ability to return to the work would not have arisen.'

* * *

"We do not agree with the workers' compensation judge's interpretation of *Smith* . . . Moreover, the record reveals that the workers' compensation judge was convinced that, in effect, the 'true reason' for the discharge was the employer's belief (albeit possibly mistaken) that re-injury or further injury would result from continued work. That being the case, a Labor Code Section 132a violation should not have been found."

Applicant filed a Petition for Reconsideration which the Appeals Board denied on July 14, 1981. Applicant thereafter filed a Petition for Writ of Review. On March 25, 1982, the Court of Appeal, First Appellate District, Division 2, rendered its decision in the above-entitled matter, whereby it annulled the Appeals Board's decisions, and remanded the matter to the Board for further proceedings consistent with the Court's opinion. In its decision, the Court noted as follows:

> ". . . Although section 132a does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are not longer available, petitioner, by returning to work and working for over four months without further injury, demonstrated that, despite her industrial injury, she remained competent to perform her job; and respondent employer did not demonstrate to the contrary. After petitioner's nonindustrial injury, she was released to return to work without restriction, and it was not until she returned to work that petitioner learned she had been terminated. Under these circumstances, the employer's good faith, albeit mistaken belief, that petitioner could not perform her work without further injury, should not have been given any credence by the board. (*Western Electric Co. v. Workers' Comp. Appeals Bd., supra*, . . .; *Judson Steel Corp. v. Workers' Comp. Appeals Bd., supra*, . . ."
> (47 CCC 335, at 338; unpublished decision.)

On June 22, 1982, the Board issued its Decision After Remittitur, noting as follows:

> "On remand to the Board, and after a complete review of the entire record in this matter, the Board believes that no further proceedings are necessary. Therefore, and the Court of Appeal having determined that in effect there was no basis for the Board's prior deci-

sions, the Supplemental Findings and Award and Order of March 3, 1981, will be reinstated."

On July 19, 1982, defendant employer petitioned for reconsideration of the Board's Decision After Remittitur, contending that certain timely raised issues have not yet been addressed. Petitioner noted as follows:

". . . *It is crucial to realize that Dalgety raised four major defenses for the Board's consideration* [in its Petition for Reconsideration filed March 30, 1981]: (1) that Section 132a requires a discriminatory motive, which, given Dalgety's conceded good faith, precludes a finding of violation (Exhibit 'A' at 14-26); (2) that federal law preempts application of Section 132a to give the Applicant relief (Exhibit 'A' at 31-36); (3) that the Arbitrator's determination that Ms. Avina could not continue to work safely constitutes collateral estoppel on that factual issue, thereby precluding a finding of violation (Exhibit 'A' at 36-37); and (4) that the record evidence simply does not support Judge Butler's finding that Ms. Avina could in fact have continued to work at Dalgety without undue risk of injury (Exhibit 'A' at 26-30). . . .

* * *

". . . The Court of Appeal subsequently ruled that the Applicant and Judge Butler were right and the Board and Dalgety wrong on the motive issue: Section 132a does not require a discriminatory motive to be violated. Dalgety petitioned the Supreme Court for a hearing, in vain.

* * *

"The indisputable fact is that, *at no point in the entire procedural sequence to date has any tribunal ruled on Dalgety's remaining three major defenses; preemption, collateral estoppel, and lack of substantial supporting evidence. . . .*"

(Petition, pp. 3, 4, 5; emphases included.)

Based on our review of the record, including the following, we are persuaded that reconsideration should be denied. The workers' compensation judge was justified in finding that at the time of the discharge there was work available which applicant could have performed without risk of either re-injury or further injury, and that the workers' compensation judge's determination to that effect was not collaterally estopped by reason of the arbitrator's previous determination (see *De Court v. Beckman Instruments, Inc.* (1973), 38 CCC 383, 387-388).

In his Report and Recommendation on defendant's earlier Petition for Reconsideration, the workers' compensation judge discussed issues other than that of motivation. In that report (dated April 9, 1981) the workers' compensation judge noted as follows:

> "In general, the petition accurately reflects the evidence and the issues, but is not complete in that it does not refer to the testimony of Stephen D. Storey, M.D., upon whose testimony I placed considerable weight.
>
> * * *
>
> "I . . . concluded on the basis of applicant's return to work, her performance thereof, and Dr. Storey's testimony, that the work did not involve a risk of re-injury, and that while the employer believed it did at the time of discharge, the employer was erroneous in that decision, and that Ms. Avina, in fact, does not present such risk.
>
> * * *
>
> "With respect to the effect of the arbitration proceeding, and the assertion that res judicata applies, I believe petitioner is in error. First, the parties are not the same. The parties to an arbitration are the Union and the Employer. The employee is a beneficiary of such action

but is not a party.

"Secondly, the issue before the arbitrator clearly differed from that before me. The contract was violated, if at all, at the time of the discharge. No question was before the arbitrator as to the applicant's right, under 'Western Electric' to demonstrate after the fact, that she could do the work. The only apparent issue before the arbitrator was whether or not Dalgety discharged her for the reasons stated, and were those reasons valid under the contract with the Union.

"Thirdly, the arbitration decision is not a decision of a Court of Record.

* * *

"As to the arguments on Federal Preemption, I am of the opinion that this issue could not be resolved by me and did not rule on the matter; the issue was raised in a timely manner and is preserved.

"It may be meritorious, but I believe beyond the authority of the trial level Workers' Compensation Judge."

By Report and Recommendation dated August 10, 1982, the workers' compensation judge further noted as follows:

"The issue of collateral estoppel, I did resolve against Defendants on the following grounds:

(a) non-identity of parties. The parties to an arbitration and grievance are the contracting parties, in this case, the union and the employer and the individual employee is not a party. (However, the 'action' is maintained for her benefit.)

(b) non-identity of issues, under the ruling of arbitrator, the good faith of Defendants at the time of the discharge was a defense.

(c) the ruling in Western Electric that applicant could show by subsequent events that there was no unreasonable risk of harm.

"On the issue of the substantiality of the evidence, I relied on the opinion of Dr. Storey at the trial that there was no such risk of further injury nor was the applicant unable to do such work. I also relied on her testimony of performance at Dalgety up until the off-work fall.

"I still express no opinion on the preemption issue . . ."

We have reviewed the cases cited by petitioner in support of its preemption argument. We find these cases to be distinguishable from the matter herein. The Labor Code Section 132a prohibition of discrimination by reason of industrial injury is not in conflict with the National Labor Relations Act directive whereby resolution of discharge cases may be provided for by collective bargaining agreements. This is not a strike case, and our disposition need not address matters of union activity. Moreover, in the Answer (dated May 26, 1981) to defendant's earlier petition, applicant's attorney urged as follows:

". . . The power of the states to regulate and enact workers' compensation laws being well established, there is no merit to the employer's federal pre-emption argument, nor are the cases cited by defendant on point.

. . .

"The gist of the employer's pre-emption argument — variously raised elsewhere in the petition under the labels 'res judicata' and 'collateral estoppel' — is that the employer's firing of Ms. Avina was not found to be violative of the collective bargaining agreement and therefore should not be found violative of Labor Code Section 132a. However, the Supreme Court clearly stated in *Judson Steel* that compliance with a collective bargaining agreement is not a defense to 132a:

" '[A]n employer may not defend a discriminatory employment practice, prescribed by Section 132a, on the basis of the provisions of a collective bar-

> gaining agreement, for a union may no more bargain away its members' statutory rights against discrimination under the workers' compensation laws than it may bargain away its members' statutory rights against, for example, sexual or racial discrimination.' *Judson Steel, supra.*"

We agree with applicant's attorney. We are persuaded that defendant's preemption argument is without merit.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration filed July 19, 1982, be, and it is hereby, DENIED.

WORKERS' COMPENSATION APPEALS BOARD
/s/ C. L. Swezey
[Seal]

I CONCUR.

/s/ Richard W. Younkin, Deputy
Gordon R. Gaines

Dated and Filed at San Francisco, California, Sep. 16, 1982.

Service by Mail on Said Date to All Parties Shown on the Official Address Record.

/s/ David Lee

APPENDIX EE.

Order Denying Petition for Writ of Review [by California Court of Appeal] (January 10, 1983).

Court of Appeal of the State of California, in and for the First Appellate District, Division One.

Dalgety Foods, Inc., Petitioner, vs. Workers' Compensation Appeals Board, et al., Respondents. No. A020025.

WCAB No. 76 SAL 8071.

Filed: January 10, 1983.

BY THE COURT:

The petition for writ of review and the request for stay are denied.

Dated: Jan. 10, 1983

[Stamp...illegible] P.J.

APPENDIX FF.

Petition for Hearing [by Dalgety Foods, Inc.] (January 20, 1983).

In the Supreme Court of the State of California.

Dalgety Foods, Inc., Petitioner, v. Angelina Avina, Respondent. Case No. ...., Court of Appeal No. A020025.

I

INTRODUCTION

On September 12, 1979, Petitioner Dalgety Foods, Inc. ("Dalgety") discharged the Respondent, Ms. Angelina Avina ("Ms. Avina"). Ms. Avina elected to grieve her discharge through the negotiated grievance procedure provided for in a collective bargaining agreement between the parties, ultimately bringing her case to arbitration before a neutral arbitrator. After a full day's hearing, and after both sides had a full and fair opportunity to present their respective positions, the Arbitrator ruled that Dalgety's decision to discharge Ms. Avina was proper because (1) Dalgety genuinely and in good faith believed that continuing to employ Ms. Avina would create an unacceptably high risk of injury to herself or fellow workers and (2) in fact, continuing to employ Ms. Avina would have created such an unacceptable risk.

Subsequently, Ms. Avina pressed a claim under Labor Code Section 132a, alleging that the real reason for her discharge was that she had resorted to workers' compensation proceedings. The parties participated in another full day's hearing, this time before Workers' Compensation Judge William R. Butler, at which they presented evidence virtually identical to that presented in the arbitration hearing. The salient exception was Ms. Avina's necessarily new testimony that, approximately eight months after her discharge, she began employment at another firm and contin-

ued to work for roughly four months.

On March 3, 1981, Judge Butler held that, in discharging Angelina Avina, Dalgety had violated Section 132a. Judge Butler ruled as follows: although he agreed with the Arbitrator that Dalgety had discharged Ms. Avina in the genuine and good-faith belief that continuing to employ her would create an unacceptably high risk of injury to herself or her co-workers, he, unlike the Arbitrator, found that Dalgety's belief was mistaken. Stating that he was bound by *Western Electric Company v. WCAB*, 99 Cal.App.3d 629 (1979), to penalize Petitioner for its — in its opinion — mistaken belief, Judge Butler held Dalgety had violated Section 132a.

Thus, the sole and dispositive factual basis for the finding of a Section 132a violation was the Workers' Compensation Judge's ruling, in direct contradiction to the Arbitrator's ruling,[1] that no safety risk existed.

Following this decision, the parties engaged in a string of appeals respectively challenging or supporting the ruling that a mere mistake about the existence of a safety risk was, standing alone, an adequate factual basis for the imposition of liability under Labor Code Section 132a. The first decision, by the Workers' Compensation Appeals Board on reconsideration, held that there could be no violation without a discriminatory motive. Since Dalgety had harbored no such motive, it had not violated Section 132a. In the last decision, however, the Court of Appeal held that, if (as Judge Butler thought) Dalgety was mistaken in seeing a safety risk in Ms. Avina's continued employment, then the discharge violated Section 132a even though Dalgety had

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[1]At one point below, Ms. Avina argued that the Arbitrator did not in fact take the position that Dalgety was correct to see Ms. Avina as a high safety risk. Selected excerpts from the Arbitrator's opinion suffice to rebut this claim; they are collected in Appendix A hereto which begins at 30, *infra*.

acted solely out of a good faith concern with safety and was possessed of no discriminatory or unlawful purpose whatsoever. This Court declined to review that decision and the case returned to the Workers' Compensation Appeals Board for further proceedings.

From that point to the instant petition, Dalgety has pressed three defenses which had not been ruled on in the first round of appeals.[2] Specifically, Dalgety has argued that Ms. Avina's Section 132a claim is preempted by federal law, that the Arbitrator's factual finding that a safety risk did exist constitutes collateral estoppel in the subsequent Section 132a proceedings, and that substantial evidence does not support the finding that no safety risk existed (primarily because, in disagreeing with Dalgety's judgment, Judge Butler relied on events occurring long after the discharge and thus about which Dalgety necessarily was ignorant).

The Workers' Compensation Appeals Board rejected Dalgety's defenses. The Court of Appeal refused to review the Board's decision.[3]

Pursuant to California Rules of Court 28 and 29, Dalgety hereby petitions this Court for a hearing to review the decision below. Review is necessary to secure uniformity of decision and to settle important questions of law. In particular, review is necessary because the decision below applies Labor Code Section 132a in a fashion that, in several ways, violates federal law.

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[2]Because the original decision of the Workers' Compensation Appeals Board had reversed Judge Butler's finding of a Section 132a violation on the ground that the statute could not be violated where no discriminatory motive was present, all subsequent proceedings had addressed the question of whether a discriminatory motive was necessary and had properly avoided ruling on Dalgety's remaining defenses.

[3]Pursuant to California Rule of Court 28(d)(2), a copy of the decision of the Court of Appeal, showing its filing on January 10, 1983, is attached hereto as Exhibit 1.

II

STATEMENT OF THE ISSUES

A. Does the application of Labor Code Section 132a to impose liability on Dalgety for discharging Ms. Avina violate federal law, where federal law preempts state-court jurisdiction over Ms. Avina's claim for relief under Section 132a because the conduct of which Ms. Avina complains is arguably prohibited by Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1)?

B. Does the application of Labor Code Section 132a to impose liability on Dalgety for discharging Ms. Avina violate federal law, where federal law preempts state-court jurisdiction over Ms. Avina's claim for relief under Section 132a because granting the relief Ms. Avina seeks would nullify the results of federally sanctioned collective bargaining?

C. Does the application of Labor Code Section 132a to impose liability on Dalgety for discharging Ms. Avina violate federal law, where such application denies collateral estoppel effect to a federally sanctioned arbitration award?

D. Does the application of Labor Code Section 132a to impose liability on Dalgety for discharging Ms. Avina violate the federal prohibition against ex post facto laws, where such application is based solely on a factual finding that no safety risk was presented by Ms. Avina's continued employment and that factual finding was based on events of which Dalgety could not possibly have been aware at the time of the discharge?

III

ARGUMENT

A. Application of Labor Code Section 132a to Impose Liability on Dalgety Violates Federal Law because Federal Law Preempts Ms. Avina's Claim

The decisions of the Workers' Compensation Appeals Board and Court of Appeal below, imposing liability on Dalgety for an alleged violation of Labor Code Section 132a,

apply Section 132a in a fashion that violates federal law because federal law preempts Ms. Avina's state-law claim. The preemption doctrine applies in two ways in this case. First, because a discharge that violates Section 132a arguably violates Section 8(a)(1) of the National Labor Relations Act as well, the State of California's jurisdiction over Ms. Avina's claim is displaced by the exclusive jurisdiction of the National Labor Relations Board. Second, because applying Section 132a in the manner Ms. Avina desires would have the effect of giving to one party that which was bid for but lost in the collective bargaining process, the State of California is preempted from granting Ms. Avina the relief she seeks.

1. Because the Discharge Arguably Violated the National Labor Relations Act, the Labor Code Section 132a Claim is Preempted

In a spate of very recent decisions, the National Labor Relations Board ("NLRB") has suggested that the National Labor Relations Act ("NLRA") may prohibit exactly the same conduct as is prohibited by Labor Code Section 132a. In two cases decided in late 1982, the NLRB intimated that, where the discharge of an employee penalizes that employee for an industrial injury or limits the employee's rights to invoke workers' compensation proceedings, the employer may have violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). *Farrens Tree Surgeons, Inc.*, 264 N.L.R.B. No. 90 (September 30, 1982); *Grumman Flexible Corporation*, 264 N.L.R.B. No. 34 (September 28, 1982). *See also Ohio Brass Company*, 261 N.L.R.B. No. 18 (April 13, 1982).[4]

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[4]In *Farrens*, *Grumman*, and *Ohio Brass*, the NLRB found that the facts of the particular case did not justify a finding that the employer had violated the NLRA, but indicated that, given proper facts, such a violation might exist.

Given the Board's position in these three 1982 cases, it is apparent that a discharge that violates Labor Code Section 132a, which prohibits an employer from penalizing an employee on account of an industrial injury or resort to workers' compensation proceedings, arguably violates Section 8(a)(1) of the NLRA as well.[5] Therefore, at least in the context of a collective bargaining agreement, an action charging that an employer violated Section 132a by discharging an employee is necessarily preempted by federal law, because federal law preempts any state-law claim based on conduct that is "arguably prohibited" by the NLRA. As the United States Supreme Court declared in the famous case of *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236 (1959):

> When an activity is *arguably subject* to §7 or §8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted . . . .
>
> It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling pre-

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[5]Several years ago, the Board had held that a discharge on account of an employee's evident intent to file a workers' compensation claim violated the NLRA, but the United States Court of Appeals for the Fourth Circuit disagreed with the Board's theory in that case and refused to enforce the Board's order. *Krispy Kreme Doughnut Corp.*, 245 N.L.R.B. 1053 (1979), *enforcement denied*, 635 F.2d 304 (4th Cir. 1980). The issue appeared to be a dead letter until, in the three 1982 cases cited above, the NLRB signalled that Section 8(a)(1) of the NLRA may make it an unfair labor practice for an employer to penalize an employee for an industrial injury or resort to workers' compensation proceedings.

> cedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to State jurisdiction . . . . The governing consideration is that to allow the States to control activities that are *potentially subject* to federal regulation involves too great a danger of conflict with national labor policy . . . .
>
> *Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of §7 or §8 of the act, the State's jurisdiction is displaced.*

Id. at 245-46 (emphasis added).

In sum, in three cases decided last year, the NLRB has indicated that conduct which violates Labor Code Section 132a may also violate Section 8(a)(1) of the National Labor Relations Act. Because the conduct of which Ms. Avina complains arguably violates the NLRA, state-court jurisdiction over Ms. Avina's claim is preempted under *Garmon*. Were this Court to condone the application of Labor Code Section 132a to impose liability on Dalgety, therefore, it would apply that state statute in a fashion that violates federal law. Accordingly, Ms. Avina's claim must be dismissed.

2. Because the Effect of Granting Relief to Ms. Avina Is to Change the Results of the Collective Bargaining Process between the Parties, the Section 132a Claim Is Preempted

Ms. Avina and Dalgety were participants in a collective bargaining relationship. While employed by Dalgety, Ms. Avina's wages and other terms of employment were governed by a collective bargaining agreement. Pursuant to that agreement, Ms. Avina and her collective bargaining representative, Teamsters Local 890, grieved the discharge which is the subject of this action. The grievance was pro-

cessed through the steps of the negotiated grievance procedure and ultimately was submitted to arbitration.

After a full and fair hearing in which the parties took full advantage of the opportunity to present their positions, the Arbitrator found that (1) the Employer discharged Ms. Avina solely because it genuinely and in good faith *believed* that continuing to employ her would present an unacceptably high risk of injury to herself or others and that (2) in fact, her continued employment *would* have presented such an unacceptably high risk. Accordingly, the Arbitrator upheld the discharge and denied Ms. Avina the relief she sought, including reinstatement and back pay. Ms. Avina did not attempt to vacate or modify the award.

Now, invoking Labor Code Section 132a, Ms. Avina again challenges the discharge and seeks reinstatement and back pay — precisely the remedies denied her in the collective bargaining process.

Federal law preempted the Workers' Compensation Appeals Board and the Court of Appeal below from granting relief to Ms. Avina. The circumstances of discharge and the procedures by which disputed discharges may be resolved are mandatory subjects of bargaining under the National Labor Relations Act, 29 U.S.C. § 150 *et seq. E.g., National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (discharge); *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403 (9th Cir. 1978), *enforcing in relevant part* 229 N.L.R.B. 757 (1977) (grievance procedure); *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943) (arbitration). The parties herein were also parties to the collective bargaining agreement which set forth the negotiated resolutions of those matters, pursuant to which Ms. Avina pressed — and lost — her bid for reinstatement.

In these circumstances, the California Labor Code may not be applied to give to one party that which she was unable

to obtain through the negotiated procedures. Such an application would frustrate the parties' solution of a problem that Congress has required them to negotiate in good faith toward solving, and in the solution of which Congress imposed no limitations relevant here. Federal labor law precludes such a result.

Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959), is the seminal case on point. *Oliver* involved a provision of another Teamsters collective bargaining agreement which set minimum rentals to be paid when an owner-operator leased his truck and services to a carrier. One such owner-operator, joined by several carriers, sued in state court to enjoin the enforcement of that provision. The state court granted the injunction on the ground that the challenged provision of the collective bargaining agreement violated the state antitrust law.

The United States Supreme Court reversed. It noted first that to some extent the challenged contractual provision prescribed wages, a mandatory subject of bargaining under the National Labor Relations Act. Application of the state antitrust law would prevent the parties from carrying out their agreement on those issues which they had arrived at through the collective bargaining process. But Congress had not affirmatively indicated that the states could limit the content of collective bargaining agreements with respect to their antitrust implications. Accordingly, the Supreme Court unequivocally held the state law preempted because:

> The application [of state law] would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here . . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can

> provide to the problems of wages and working conditions. . . . Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necesarily outside the power of the state.

Id. at 296.

The instant case presents the same situation. The parties had negotiated the means by which their disputes over discharges would be resolved and the circumstances in which discharges would be proper. Pursuant to that negotiated arrangement, Ms. Avina challenged her discharge in arbitration, where she lost. In effect, the parties bargained for a resolution of the dispute and Dalgety prevailed. Application of Labor Code Section 132a to grant Ms. Avina relief would invalidate the agreement reached through the collective bargaining process mandated by Congress. *Oliver* rejects such a result.

Five years after *Oliver*, the Supreme Court repeated its admonition in *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964), a case that involved a suit in federal district court alleging, among other things, a state cause of action for damages. The plaintiff was an employer whose facility was the site of an economic strike conducted by the union representing the employees. The stike occurred subsequent to an impasse in contract negotiations.

In the course of the strike, the union persuaded the management of one of the employer's customers to cease doing business with the struck company. State common law prohibited the union's appeal to the customer. The trial court awarded both compensatory and punitive damages to the struck employer. The appellate court affirmed.

The Supreme court reversed. Federal law neither protected nor prohibited the union's activity, so the Court inquired "whether the application of state law in this kind of

case would operate to frustrate the purpose of the federal legislation." *Id.* at 258. The Court found no affirmative Congressional intent to permit a state to take from the union the economic weapon it had exercised in the course of its collective bargaining relationship with the plaintiff. Accordingly, *state law could not be used to alter the results achieved by the parties themselves in the process of collective bargaining:*

> For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.

Id. at 260. *Accord, Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

In the instant case, Ms. Avina brought a state action just as in *Morton*. Precisely as in *Morton*, she seeks to use state law to obtain a result different from that which came out of the collective bargaining relationship between the parties. Just as in *Morton*, federal law preempts such an application of state law: where the parties to a collective bargaining relationship have agreed on a solution to a dispute over a mandatory subject of bargaining — as they did in this case by submitting the dispute over Ms. Avina's discharge to final and binding arbitration — state law may not be used to alter the results achieved through the collective bargaining process.

Preemption has become particularly clear now that the Court of Appeal has ruled (in the previous appeal) that Dalgety may have violated Section 132a *even though it has been adjudicated that Dalgety discharged Ms. Avina without any discriminatory or improper purpose whatsoever and for the sole reason that it believed in good faith that her continued employment presented a safety risk.*

Once the issue of discriminatory motive was held to be immaterial, there remained *nothing* about the Section 132a proceeding that could distinguish it from the arbitration proceedings. The sole factual basis for the Section 132a violation in this case is Judge Butler's finding, in direct conflict with the finding of the Arbitrator, that no safety risk existed.

As a practical matter, therefore, *the only function Section 132a is serving as it is applied in the instant case is to avoid the finality of the arbitration award* and give Ms. Avina precisely what was denied her in the arbitration proceedings for precisely the reason that was rejected in those proceedings. In these circumstances, the application of Section 132a to grant Ms. Avina relief violates federal law.

B. Application of Labor Code Section 132a to Impose Liability on Dalgety Violates Federal Law because It Denies Collateral Estoppel Effect to a Federally Sanctioned Arbitration Award.

It is now established that Dalgety discharged Ms. Avina solely out of safety-related concerns and without any discriminatory motive or improper purpose whatsoever. Accordingly, the sole factual basis for the finding below that the discharge violated Section 132a is the ruling of the Workers' Compensation Judge that Dalgety was *wrong* to decide that continuing to employ Ms. Avina would have presented an undue safety risk.[6] Yet, as Dalgety pointed out to the Workers' Compensation Judge, the Arbitrator had already squarely considered that factual issue and had decided that Dalgety was *right* to see an undue safety risk.

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[6]Dalgety earlier argued to this Court that Section 132a should not be interpreted to permit a finding of violation bases solely on a purported error in judgment in the conceded absence of an unlawful motive, but this Court declined to grant a hearing.

Because federal law makes the arbitration award binding, the refusal by the Workers' Compensation Appeals Board and Court of Appeal below to give collateral estoppel effect to this key factual finding of the Arbitrator applies Section 132a in a manner that violates federal law. Moreover, because California law as well is quite clear that an arbitration award has collateral estoppel effect with respect to the factual findings of the arbitrator, the refusal below to extend that effect in the instant case violates the guarantee of due process contained in the United States Constitution.

1. Because Federal Law Makes the Arbitrator's Factual Findings Conclusive in Subsequent Litigation, Application of Section 132a to Give Ms. Avina Relief Despite the Arbitrator's Factual Findings Violates Federal Law

One of the most fundamental principles of federal labor law is that, where a collective bargaining agreement provides for final and binding arbitration of an employee's dispute, in subsequent litigation the arbitrator's decision is conclusive as to all issues addressed. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Republic Steel v. Maddox*, 379 U.S. 650 (1965); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *see generally* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look At Enterprise Wheel And Its Progeny*, 75 Mich. L. Rev. 1137 (1977). *Cf. Marsh v. Pacific Motor Trucking Co.*, ___ F.Supp. ___, 89 L.R.R.M. 2518, 2523 (C.D. Cal. 1975) ("[b]y submitting their claims to the grievance process, plaintiffs have elected that remedy and the decision of the grievance panel bars their defamation claims").

Pursuant to this principle of federal law, if the grievant brings a subsequent action in state court that involves an

issue determined in the prior arbitration proceeding, the state court *must* enforce the ruling of the arbitrator rather than allow the relitigation of such an issue. *See, e.g., Bates v. Foremost-McKesson, Inc.*, 110 L.R.R.M. 2178 (Louisiana 1980); *New York v. Klein*, 100 L.R.R.M. 2134 (New York 1978); *Turpin v. Love*, 84 L.R.R.M. 2346 (Tennessee 1973); *Dudash v. Rockwell Standard Company of New Castle*, 79 L.R.R.M. 2779 (Pennsylvania 1971); *Haworth v. White Stack Towing Company*, 78 L.R.R.M. 2613 (South Carolina 1971); *Heath v. Central Truck Lines, Inc.*, 65 L.R.R.M. 2136 (Florida 1967); *Turner v. Steffke Freight Co.*, 56 L.R.R.M. 2651 (Illinois 1964); *Johnson v. American Can Company*, 51 L.R.R.M. 2652 (Texas 1962); *Clover v. Columbus Retail Merchants Delivery, Inc.*, 51 L.R.R.M. 2387 (Ohio 1962).

It takes little to see that federal law requires that factual issues determined in an arbitration under a collective bargaining agreement not be relitigated in subsequent state-court litigation. In the instant case, the application of Labor Code Section 132a to grant relief to Ms. Avina despite the Arbitrator's determination against her of the dispositive factual issue violates federal labor law.

2. Because California Law Makes the Arbitrator's Factual Findings Conclusive in Subsequent Litigation, Application of Section 132a to Give Ms. Avina Relief Despite the Arbitrator's Factual Findings Violates the Federal Requirement of Due Process

Before the decision below in the instant case, California court invariably followed the federal rule that, in subsequent litigation by the unsuccessful grievant, an arbitration award constitutes collateral estoppel as to factual issues therein determined. *See, e.g., Carroll v. Puritan Leasing Co.*, 77 Cal.App.3d 481, 491-93 (1978); *Tevis v. Biegel*, 156

Cal.App.2d 8 (1957); 4 Witkin's California Procedure (Judgment) § 197 *et seq.* (2d ed. & Supp. 1981). As was said in *Lehto v. Underground Contruction Co.*, 69 Cal.App.3d 933 (1977):

> The policy of the law is to favor arbitration, and every reasonable intendment is indulged to give effect to such proceedings . . . . *Once a valid award is made by the arbitrator, it is conclusive on matters of fact and law and all matters in the award are thereafter res judicata.*

Id. at 939 (emphasis added). *Accord, Lindholm v. Galvin*, 95 Cal.App.3d 443, 450 (1979).

Again, before the decision below in the instant case, California courts also consistently rejected attempts by employees such as Ms. Avina to escape, on the theory that the union rather than the employee was the party to the arbitration proceeding, the collateral estoppel effects of arbitration awards. *E.g., Cortez v. California Motor Express Company, Ltd.*, 226 Cal.App.2d 257, 262 (1964).

Illustrative is *Archuleta v. Grand Lodge of the International Association of Machinists*, 262 Cal.App.2d 202 (1968), in which employees brought a lawsuit seeking relief from their allegedly improper discharges. The union and the employer had arbitrated the propriety of the discharges; the arbitrator had decided in the company's favor. The court rejected the employees' contention that the arbitration award did not preclude their lawsuit:

> Although plaintiffs allege that their dispute was not properly covered by arbitration, where there has been an arbitration award and decision under the labor contract grievance and arbitration procedure, as in the present case, fully adjudicating the dispute, that decision is final and binding on the parties *and employees* involved and precludes further litigation of the controversy on its merits.

Id. at 208 (emphasis added).

Directly on point is *Conner v. Dart Transportation Service*, 65 Cal.App.3d 320 (1976). In *Conner*, an employee had been discharged for theft. Like Ms. Avina, the employee grieved the propriety of the discharge. Just as in the instant case, the dispute was arbitrated in proceedings in which the employee was represented by the union. Just as in this case, the arbitration board affirmed the discharge, agreeing with the employer on the factual question of whether theft had occurred, and the employee did not seek judicial review. The employee then brought a lawsuit in which the dispositive factual issue was whether he really had stolen. Pleading the arbitration award in which the factual question of theft had been resolved against the employee, the defendants obtained summary judgment. On appeal, the *Conner* court affirmed because the arbitration award collaterally estopped the employee in subsequent litigation and conclusively established that he had committed theft:

> The record negates the existence of a triable issue of fact . . . . "As a rule, the granting of an [arbitration] award will act as a bar to civil litigation on the same issues. So, if an employee who is affected adversely by an arbitration sustaining his discharge brings an action, say, for breach of contract, the action will be dismissed" . . . .
>
> *Here the result of the arbitration was to establish Conner's dishonesty as a fact.* The proceeding before the Joint State Committee is in essence one in arbitration . . . . Conner voluntarily initiated the arbitration process. Once initiated, the process determined that Conner was properly discharged for dishonesty, thus establishing the existence of the ground for which he was fired.

Id. at 323-24.

In the instant case, the same logic compels the same conclusion: Ms. Avina voluntarily initiated the grievance leading to the arbitration proceedings, the Arbitrator determined that her continued employment would present a safety risk, and that determination conclusively established that safety risk as a fact. It was, therefore, not open to Workers' Compensation Judge Butler to disagree; the Arbitrator's decision constituted collateral estoppel.

But in the instant case, the decisions below ignore the heretofore-unquestioned California law of collateral estoppel and refuse to give conclusive effect to the Arbitrator's factual finding that Dalgety was correct to judge that continuing to employ Ms. Avina would present an undue safety risk. What's more, California precedent is ignored without any substantial explanation.[7]

We respectfully submit the application of Section 132a to grant Ms. Avina relief in the face of the hithertobroken precedents on the collateral estoppel question is such a grave and inexplicable departure from established California law as to violate the federal guarantee of due process. Stare decicis is, after all, effectively an element of due process.

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[7]The Workers' Compensation Appeals Board evidently declined to give collateral estoppel effect to the arbitration award in the belief that the rules of res judicata (merger and bar) are the same as the rules of collateral estoppel (issue preclusion). Because the arbitrator faced an ultimate issue of contractual interpretation rather than statutory violation, the arbitration decision was not res judicata as to the Section 132a claim. Of course, the Board was badly mistaken to think that this impacted on the collateral estoppel question: the preclusive effect of an arbitration award on a factual issue actually determined is the same regardless of the ultimate issue before the arbitrator. This is elementary, black-letter law. As Witkin says, "[a] second action between the same parties on a different cause of action is not precluded by a former judgment . . . [b]ut the first judgment 'operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' " 4 Witkin's California Procedure (Judgment) § 197 (2d ed. 1971).

Cf. 5 Witkin's Summary of California Law (Constitutional Law) § 74 (8th ed. 1974 & Supp. 1982) (due process violated by enforcement of uncertain statute).

C. Because the Decision that No Safety Risk Existed Was Based on Facts that Occurred Long After Dalgety Discharged Ms. Avina, Application of Section 132a to Give Ms. Avina Relief Violates the Federal Prohibition of Ex Post Facto Laws

Even apart from the illegality of the refusal below to accord conclusive effect to the Arbitrator's ruling on the dispositive factual issue of whether Ms. Avina's continued employment really did present a safety risk, the ruling below that no safety risk existed violates federal law. When the Worker's Compensation Judge decided that Dalgety was wrong to judge that a safety risk was presented by Ms. Avina's continued employment, he was looking to events that occurred eight months to a year *after* Ms. Avina was discharged. Specifically, it was held that Ms. Avina's employment at another firm beginning eight months after her discharge — *beginning after she had been off work and recuperating for eight months* — showed that Dalgety was wrong to see a safety risk *at the time of the discharge*.

We respectfully submit that application of Section 132a in this way violates the federal prohibition against state ex post facto laws. *See* United States Constitution, Article 1, Section 10.

As Witkin says, an ex post facto law is one which "punishes an act innocent when done . . . or deprives a person of a defense." 5 Witkin's Summary of California Law (Constitutional Law) § 258 (8th ed. 1974). In the instant case, there is *no* way that Dalgety could have known in advance that the discharge could violate Section 132a. It has been adjudicated that Dalgety's sole reason for discharging Ms.

Avina was its good faith belief that a safety risk existed. The Arbitrator confirmed that, on the basis of the facts available to Dalgety *at the time of the discharge*, a safety risk was plainly presented. But because Ms. Avina evidently recuperated during her eight months of leisure after her discharge — and it is informative that, in his original decision, even the Workers' Compensation Judge expressed surprise at the extent and speed of that recuperation — the Workers' Compensation Judge ruled that Dalgety was wrong about the risk.

And that purported mistake, a mistake at best discoverable only after eight months had elapsed since Dalgety discharged Ms. Avina, a mistake made despite Dalgety's conceded good faith and absence of discriminatory or unlawful motive, in fact a mistake which even the Arbitrator chosen by the parties confirmed, was turned below into a ground for imposing on Dalgety potentially enormous back-pay liability and a penalty of up to $10,000.00. The application of Section 132a in this fashion violates the federal prohibition against ex post facto laws.

IV
CONCLUSION

Exactly what did Dalgety do that justifies the imposition of back-pay liability and a penalty of up to $10,000.00 under Labor Code Section 132a? Dalgety discharged Ms. Avina, believing that continuing to employ her would present an undue risk of injury to herself or her co-workers. Dalgety harbored absolutely no discriminatory or unlawful purpose whatsoever. The Arbitrator — the skilled and impartial decision-maker chosen by the parties — agreed with Dalgety that the safety risk existed.

But, looking at events occurring eight months to a year after the fact, the Workers' Compensation Judge saw no

safety risk.

And solely because of that single difference in judgment, despite the absence of any discrimination, Dalgety is exposed to potentially enormous back-pay liability and a very substantial penalty under a statute designed to prohibit discrimination.

Is this just? We respectfully submit that to ask the question is to answer it.

For all the reasons discussed above, Petitioner Dalgety Foods, Inc. urges this Court to grant a hearing and exonerate Dalgety from the charge of having violated Labor Code Section 132a.

DATED: January 20, 1983.

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
GEORGE J. TICHY, II, ESQ.
MICHAEL B. MARGOLIS, ESQ.

By /s/ Michael B. Margolis
MICHAEL B. MARGOLIS

Attorneys for Petitioner
DALGETY FOODS, INC.

APPENDIX A

EXCERPTS FROM THE ARBITRATOR'S DECISION

The Arbitrator's Decision and Award is replete with remarks confirming Dalgety's judgment that continuing to employ Ms. Avina would present an undue risk, as the following selected excerpts show:

> In this instance, no one imputed evil, malfeasance or misconduct to Ms. Avina. Rather, it was a cumulative series of misfortunes, which appear, when taken in total, to have strong possibilities of multiplying and intensifying.

Decision and Award at 5.

> These issues [regarding reinstatement of injured workers] nearly always revolve around two areas: (1) Was the labor contract violated? (2) Was the employer hasty, frivolous or inconsiderate? There is a third consideration: Is the grievant's opinion of his, or her, ability to continue the occupation based on reality? Is the grievant motivated, or driven, by economic necessity, or by confidence in his physical ability to consistently perform the task at hand in an acceptable manner? The amount of the Workers' Compensation Award, the communications and testimony of Dr. Storey and the lawyer for Dr. Dohn served to indicate the severity of the injury to which they were addressing themselves. *The history of other injuries served to emphasize the cumulative effect of these injuries, and taken in combination with the record, indicates a strong possibility of future injuries unless Ms. Avina conducts herself very, carefully and does not get involved in a hazardous environment.*

Id. at 7 (emphasis added).

> The back condition will probably not get better and has high possibilities of getting worse, especially if she should suffer another fall. No improvement can be

reasonably anticipated insofar as her wrist is concerned and, with the presence of arthritis, one can assume that it is degenerative. In the case of her prosthetic knee, it would seem reasonable to conclude that she will have ever-increasing difficulty in spending a full work shift standing before a belt or a table, and indulging in motions that exercise her arms and back, causing constant shifts in the weight on her legs and feet. The wet environment and the necessity to use stairs, occasionally or frequently, presents a real impediment to her well being.

The Arbitrator was a little less than enthusiatic about the testimony of Dr. Storey. We are sure the Doctor, among other things, was cognizant of Ms. Avina's economic need to keep employed. One can assume that he must have been strongly implored to prepare and dispatch a letter of release. As he noted, quite honestly, in his testimony, had he been provided with all the information that became available subsequent to that letter, he perhaps would have had "second thoughts". *Id.* at 7-8.

Casting aside, for the moment, the contract provisions and legal points at hand . . ., the Arbitrator also must consider this matter in terms of its impact on Ms. Avina as a human being. The question arises: What will the impact and effect on her be if she is returned to her employment with the Company? We do not know Ms. Avina's age, but would suggest that, under normal circumstances, she must have a life expectancy of at least a couple of decades. The question is for how long, in her circumstances, could she perform work? Would it be a month, a season or a couple of seasons? This, of course, we do not know. *We do truly believe that manual labor of the type required on this job and, for*

> *that matter, any other kind of job that may become available to Ms. Avina, will severely shorten the productive span of her life.*

Id. at 8 (emphasis added).

EXHIBIT "1."

Court of Appeal of the State of California in and for the First Appellate District, Division One.

Dalgety Foods, Inc., Petitioner, vs. Workers' Compensation Appeals Board, et al., Respondents. No. A020025.

WCAB No. 76 SAL 8071

Filed: January 10, 1983.

BY THE COURT:

The petition for writ of review and the request for stay are denied.

Dated: Jan. 13, 1983

[Stamp ... illegible] P.J.

PROOF OF SERVICE BY MAIL

I, Vickie Yates, declare I am a citizen of the United States and am employed in the City and County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action. My business address is 1925 Century Park East, Suite 850, Los Angeles, California 90067.

On January 20, 1983 I served the within PETITION FOR HEARING on the parties involved by placing a true copy thereof in a sealed envelope, with postage thereon prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Alfred Lombardo, Esq.
Rucka, O'Boyle & Lombardo
245 West Laurel Drive
Salinas, California 93906

Honorable William R. Butler
Worker's Compensation Appeals Board
21 West Laurel Drive, Suite 69
Salinas, California 93901

Worker's Compensation Appeals Board
Reconsideration Department
455 Golden Gate Avenue
San Francisco, California 94102

Mission Insurance Company
Post Office Box 5219
San Jose, California 95150

State Compensation Insurance Fund
Post Office Box 759
San Jose, California 95106

Hartford Accident and Indemnity Company
Post Office Box 5086
San Jose, California 95150

Clifford C. Porter, Clerk

Court of Appeals, First Appellate District
State Building, Room 4154
455 Golden Gate Avenue
San Francisco, California 94102

I, Vickie Yates, certify under penalty of perjury that the foregoing is true and correct, and that this document was executed on the 20th day of January, 1983, at Los Angeles, California.

/s/ Vickie Yates
VICKIE YATES

APPENDIX GG.

Answer to Petition for Hearing [by Angelina Avina] (January 28, 1983).

In the Supreme Court of the State of California.

Dalgety Foods, Inc. Petitioner, vs. Angelina Avina, Respondent. Case No. ...., Court of Appeal No. A020025.

INTRODUCTION

The present case comes before this Court for the second time. Petitioner, Dalgety Foods, Inc. (hereinafter "Dalgety") resists compliance with the judgment of the Workers' Compensation Appeals Board. That judgment was rendered pursuant to the direction of the First District Court of Apeal following a grant and transfer from this Court. As Dalgety notes in its petition, both parties have long ago fully briefed their respective positions. A final judgment has also long ago been entered regarding those positions. The present petition is therefore entirely frivolous and Mrs. Avina and her counsel incorporate herein by reference their petition to this Court requesting that appropriate sanctions be applied against Dalgety and its counsel.

SUMMARY OF FACTS AND CAST

Mrs. Avina was originally hired in 1968 by Speigle Foods, Inc., the predecessor in interest to respondent Dalgety. She continued to work seasonally at Dalgety as a conveyor belt worker and produce sorter for eleven years. Commencing in 1973, she suffered a series of industrial and non-industrial injuries, ranging from knife cuts common in such occupations to more severe injuries to her wrist and knee. The knee injury, occurring in 1976, prompted her to file a workers' compensation claim. This action ended with a Compromise and Release payment from the Mission Insurance Company to Mrs. Avina of $22,628.80. Shortly thereafter,

petitioner was injured as the result of a non-ndustrial fall. Some weeks later, she presented to Dalgety a medical release, signed by her physician, which authorized her to return to her former work. Dalgety nevertheless refused to put her to work and notified her in writing that her employment was terminated. Mrs. Avina then sought, and eventually found, similar employment with another company.

Mrs. Avina's union at Dalgety initiated a grievance procedure to contest her discharge. During the arbitration hearing which culminated that procedure, the union alleged that Mrs. Avina had not been discharged for "cause," a term defined in the collective bargaining agreement between Dalgety and the union and the only basis for discharge recognized as legitimate in that agreement. Dalgety maintained that it had discharged Mrs. Avina because its managers believed that her injuries had so disabled her that her continued employment would endanger both herself and those co-workers who would depend upon her performance. The arbitrator ruled in favor of Dalgety.

Mrs. Avina simultaneously filed a claim with the Workers' Compensation Appeals Board (hereinafter "WCAB") alleging that her discharge was a response by Dalgety to her workers' compensation settlement and that it therefore was discriminatory and in violation of Labor Code §132(a). In support of this allegation, petitioner submitted evidence that: (1) the process by which Dalgety eventually discharged her was initiated as a reaction to the size of the Compromise and Release settlement which she received; (2) Dalgety did not investigate the effect petitioner's injuires had on her job performance in reaching its decision to discharge her; and (3) Dalgety discounted completely the medical release presented by petitioner, choosing instead to rely on the indpendent medical assessment made by a non-medical em-

ployee. In response, Dalgety contended inter alia: (1) that §132(a) is not violated unless the employer acts out of a discriminatory motive; (2) that it had engaged in a thorough investigation of Mrs. Avina's injuries prompted by the size of her workers' compensation award and had genuinely and reasonably concluded that she was incapable of continuing her work; (3) that the arbitrator's findings should be binding in the §132(a) action under the doctrine of collateral estoppel; and (4) that federal labor law pre-empted the §132(a) action.

The Workers' Compensation Judge ruled in favor of Mrs. Avina. His opinion discussed all of Dalgety's defenses. The WCAB reversed the judge's decision on the grounds that Dalgety's good faith belief, even if mistaken, that Mrs. Avina was unable to continue to work was sufficient to rebut a §132(a) discrimination charge. The Appellante Court then denied Mrs. Avina's Petition for Writ of Review. Upon further appeal, this Court directed the Appellate Court to entertain such a writ and referred the Court to the case of *Western Electric Company v. WCAB* (1979) 99 Cal. App. 3d 629. The Appellate Court then issued an opinion stating that Mrs. Avina had clearly demonstrated an ability to resume her work and that Dalgety's belief that she could not do so should not have been given credence by the WCAB.

Dalgety petitioned the Appellate Court for a re-hearing on the grounds that the Court had misinterpreted §132(a) and had not addressed the federal pre-emption and collateral estoppel defenses. In response, the Appellate Court issued a footnote to its earlier opinion which stated that an arbitrator's decision that the dismissl was consistent with the collective bargaining agreement did not bind either the WCAB or the Appeals Court in a §132(a) action. Dalgety then unsuccessfully petitioned to this Court for a hearing on the same grounds.

In its Decision After Remittitur, the WCAB decided that further proceedings were unnecessary and reinstated the Workers' Compensation Judge's original decision in favor of Mrs. Avina. Dalgety petitioned for reconsideration, again on the grounds of federal pre-emption and collateral estoppel. The WCAB denied that petition. The Appellate Court dismissed Dalgety's subsequent Petition for Writ of Review, brought on the same grounds. Dalgety seeks review here once again.

Mrs. Avina has cross-petitioned for an award of attorney's fees pursuant to Labor Code §5801.

ARGUMENT

I.

I. DALGETY'S CONTENTIONS HAVE ALREADY BEEN FULLY LITIGATED; ITS APPEAL IS FRIVOLOUS.

Dalgety's petition rests on three contentions: (1) the arbitrator's decisions collaterally estop the judicial consideration of issues relating to a §132(a) action; (2) Federal law pre-empts §132(a) in this case; and (3) the decision in Mrs. Avina's favor violates the prohibition against the Ex Post Facto Laws. These contentions are well known to this Court. Indeed, Dalgety fully briefed them previously upon Mrs. Avina's initial Petition for Hearing and upon Dalgety's Petition for Hearing following Review. The contentions simply were not found persuasive. Dalgety refuses to accept this result and so yet again asks this Court to reconsider.

In support of its petition, Dalgety maintains that previous proceedings in this case have failed to address its contentions. This is simply untrue. Collateral estoppel and federal pre-emption were raised and considered as defenses in this case at each stage. There is no reason to believe, as Dalgety does, that each tribunal below overlooked those defenses.

Rather, the Appellate Court modified its opinion, in response to a petition for re-hearing filed by Dalgety, to insert an express rejection of the notion that the arbitrator's decisions were binding in the §132(a) action. Dalgety takes exception to the Appellate Court's failure to extensively discuss the reasons behind that rejection. There is, of course, no authority to the effect that each issue involved in the case must be discussed at length, or even at all, in the Court's written opinion.

II. NOTWITHSTANDING THE FRIVOLITY OF THE PRESENT APPEAL, DALGETY'S CONTENTIONS SHOULD FAIL ON THEIR MERITS.

A. THE ARBITRATOR'S DECISIONS DO NOT COLLATERALLY ESTOP THE JUDICIAL CONSIDERATION OF DIFFERENT ISSUES RELATING TO A §132(a) ACTION.

The gist of Dalgety's collateral estoppel argument is that the arbitrator decided that Mrs. Avina was a danger to the work place and that the Workers' Compensation Judge was bound by that decision. Mrs. Avina contends, as detailed below, (1) that the issue before the arbitrator was whether defendant had acted arbitrarily or capriciously and not whether Mrs. Avina was a danger to the work place; (2) that any decision the arbitrator may have made on the "danger to the work place" issue was therefore dicta and not binding on the Workers' Compensation Judge; and (3) the issue before the WCAB involved whether Dalgety's conduct had passed a standard beyond merely being non-arbitrary and non-capricious.

B. THE ISSUE BEFORE THE ARBITRATOR WAS MERELY WHETHER DALGETY ACTED ARBITRARILY OR CAPRICIOUSLY IN DISCHARGING MRS. AVINA.

The first sentence of the arbitrator's "decision and award" reads as follows: "The question before the arbitrator is, 'was Angelina Avina discharged for cause within the mean-

ing of the collective bargaining agreement?' "

In their Post-hearing Brief, dated December 26, 1979, counsel for Dalgety states that "the contract requirement of 'sufficient cause' for discharge would be satisfied by all but the most outrageously unjust discharges." Counsel for Dalgety also stated that all arbitrators agreed that a discharge must be upheld absent evidence that it stemmed from "arbitrary, capricious, or discriminatory intent." *Post-hearing Brief of employer Dalgety Foods, Inc.*, December 26, 1979 at pages 21 - 22, citing *Arkansas Chemicals, Inc.* 51 LA 579 (1968) and *Sealright Company, Inc.* 61 LA 909 (1973).

The language of the arbitrator's "decision and award" indicates that he agreed that the "arbitrary or capricious" standard was appropriate in arbitration proceedings involving discharge grievances. The "decision and award" reads in entirety as follows:

> "It is the conclusion of the Arbitrator that the Company did not violate the collective bargaining agreement, was not arbitrary or capricious in reaching its decision; therefore, the Arbitrator is compelled to deny the grievance and sustain the discharge."

Mrs. Avina's union elected not to seek judicial review of the arbitrator's decision in favor of Dalgety and thereby conceded that the arbitrary or capricious standard has been appropriate. Thus, it is now undisputed that the arbitrator used an "arbitrary or capricious" standard as the measure of whether Mrs. Avina's violated the collective bargaining agreement.

C. ANY DECISION THE ARBITRATOR MAY HAVE MADE REGARDING THE "DANGER TO THE WORK PLACE" ISSUE WAS DICTA AND NOT BINDING IN A LATER §132a ACTION.

In the pages preceeding the "Decision and Award" the arbitrator discusses the perspectives of the union and Dalgety. Specifically, he indicated: (1) that Mrs. Avina had

suffered a series of injuries; (2) that her past injuries might cause her to be subject to future injuries if not careful; (3) that her back, wrist and knee problems might not get better and might well get worse; (4) that the physical demands of the job presented difficulties for her; and (5) that years of manual labor might reduce her productive life. [Sequencing corresponds to the listings in Dalgety's Appendix A]. Dalgety contends that these points amount to a finding by the arbitrator that Mrs. Avina was a danger to the work place. Without considering that contention on its merits, Mrs. Avina submits, as explained above, that the arbitrators mission was to decide whether Dalgety's decision that Mrs. Avina constituted a danger to the work place was arbitrary or capricious. Any opinion that arbitrator may have expressed as to whether Dalgety's decision met a further and more demanding standard such as "objective correctness" was unnecessary to completion of his mission and therefore was dicta. The dicta contained in an arbitrator's decision, of course, is not protected by the doctrine of collateral estoppel in a subsequent civil litigation. Therefore, even should this court agree that the arbitrator found Mrs. Avina to be a danger to the work place, that finding was bot binding on the Workers' Compensation Judge in the subsequent 132a action.

Dalgety's reliance on *Conner v. Dart Transportation Service* 65 CA.3d 320 (1976), reflects a failure to consider the concept of dicta. In *Conner*, the plaintiff was an employee who had been discharged for theft. The employee contested the discharge in arbitration. The issue before the arbitrator, as in the present case, was whether the employee had been dismissed "for cause". In resolving that issue, the arbitrator was obliged to first resolve the threshhold issue of whether the employee had committed theft inasmuch as that was the sole justification for the discharge offered by the employer.

Since the arbitrator decided this issue, essential to the arbitration, that employee was precluded from relitigating the issue in civil court.

Dalgety attempts in the present case to characterize the issue of whether Mrs. Avina was in fact a danger to the work place as such an essential threshhold issue. However, as discussed above, the arbitrator was not obliged to resolve the "danger to the work place" issue in order to resolve the ultimate issue of whether Dalgety acted arbitrarily or capriciously in discharging Mrs. Avina. As the Workers' Compensation Judge noted in his "Recommendation on Petition for Reconsideration" (Exhibit A)," . . . Under the ruling of the arbitrator, the good faith of defendants at the time of the of the discharge was a defense". The arbitrator clearly decided that Dalgety genuinely believed Mrs. Avina was a danger to the work place. As Dalgety successfully contended at arbitration, this good faith belief alone justified the discharge of Mrs. Avina under the collective bargaining agreement in that it demonstrated that Dalgety acted neither arbitrarily nor capriciously. Any further findings of the arbitrator were non-essential. Mrs. Avina was therefore not precluded from litigating those issues, as she did, before the WCAB.

D. THE ISSUE BEFORE THE WORKERS' COMPENSATION JUDGE WAS NOT LIMITED TO WHETHER DALGETY HAD ACTED ARBITRARILY OR CAPRICIOUSLY.

The ultimate issue before the Workers' Compensation Judge, and subsequently the WCAB and the reviewing Courts, was whether Dalgety's discharge of Mrs. Avina violated §132a. Each tribunal elected to frame that issue in terms of a threshhold issue. As discussed below, the re-

spective tribunals differed in their framing of that threshhold issue.

Mrs. Avina has consistently maintained that the threshhold issue before the Workers' Compensation Judge was simply whether or not Dalgety singled her out for investigation in reaction to her workers' compensation settlement. In *Judson Steel Co. v. WCAB* (1978) 122 Cal.3d 658, 150 Cal. Rptr. 250, this Court held that §132a prohibited discrimination *in any manner* by an employer against an industrially injured employee on the basis of the employee's injury. In the present case, the Workers' Compensation Judge's "Minutes of Hearing" recounts on page five the testimony of Mr. Bryan Muth, Director of Industrial Relations for Dalgety during the tenure of Mrs. Avina. Mr. Muth freely admitted, in the Judge's words, that "he became aware of Mrs. Avina's problem because a copy of the Order Approving Compromise and Release crossed his desk. The size of the sums drew his attention, and he called personnel and the medical facility to investigate the nature of the problem". Assuming that the relevant threshhold inquiry is whether Mrs. Avina was singled out for investigation, this testimony is dispositive. Mr. Muth freely admits that the investigation which led to Mrs. Avina's discharge was a response to the size of Mrs. Avina's workers' compensation award.

The Workers' Compensation Judge framed two threshhold issues, each in accord with *Western Electric Company v. WCAB*, supra. First, he considered whether Mrs. Avina had demonstrated whether she could return to work without risk of reinjury. Upon deciding that Mrs. Avina had so demonstrated, the Judge considered whether Dalgety had rebutted the inference, drawn as in *Western Electric*, that its discharge of Mrs. Avina was discriminatory. The Judge concluded that Dalgety had not rebutted that presumption.

The Appellate Court likewise assumed that Dalgety held its belief that Mrs. Avina was a danger to the work place in good faith. The Court framed the threshhold issue as whether that good faith belief should have been given credence by the WCAB. After application of the two part test of *Western Electric*, considered above, the Court concluded that Dalgety's good faith belief was unsupportable.

While, as discussed above, the various tribunals have differed in the framing of the threshhold issue, none has adopted Dalgety's contention that the "arbitary or capricious" issue should be considered in the §132a action. Likewise, no tribunal has adopted Dalgety's contention that any decisions the arbitrator may have made on an issue not before him should be dispositive of issues presented in workers' compensation action.

III. DOCTRINE OF FEDERAL PREEMPTION

A. OVERRIDING STATE INTEREST PRECLUDES APPLICATION.

Dalgety contends that the liability imposed on it by application of §132a of the California Labor Code violates federal law in two respects: First, because Mrs. Avina's claim for relief under §132a is preempted by the jurisdiction of the National Labor Relations Act since Dalgety's conduct which gave rise to the claim is "arguably prohibited" by §8(a)(1) of the Act; and second, because granting respondent relief under §132a "nullifies the results of federally sanctioned collective bargaining".

Both contentions are without merit. Dalgety's assertion that "federal law preempts any state-law claim based on conduct that is 'arguably prohibited' by the NLRA," is not supported by the history of judicial applications of doctrine of preemption: the courts have avoided any such inflexible or mechanical application of the doctrine of preemption.

The general rule of preemption was set forth by the United States Supreme Court in *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959). The *Garmon* court recognized that there had been and would be exceptions to its general rule in appropriate classes of cases, and the courts have accordingly refused to apply the preemption doctrine to activity that might otherwise would fall within the scope of *Garmon*, that is, activity arguably subject to §7 or §8 of the NLRA if that activity "was a merely peripheral concern of the LMRA. . . . or touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act". Id., at 243-244. E.g., *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (malicious libel); *Farmer v. Carpenters*, 430 U.S. 290 (1977) (intentional infliction of emotional distress).

Similarly, preemption does not apply "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statute". *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

In the *Farmer* case, the Court held that a union member who alleged that his union had engaged in a campaign of personal abuse and harrassment against him, could maintain an action for damages against the union and its officers for the intentional infliction of emotional distress. One aspect of the alleged campaign of harrassment was discrimintation by the union in hiring hall referrals. Although such discrimintation was arguably prohibited by §8(b)(1)(A) and §8(b)(2) of the NLRA and therefore an unfair labor practice, the Court permitted the state to proceed despite the risk that the state cause of action would touch on an area of primary

federal concern and despite the potential for interference with the federal scheme of regulation. The Court identified two principal factors which warranted its departure from the general preemption guidelines: (1) the substantial state interest in protecting its citizens from the challenged conduct; and (2) a finding that the exercise of state jurisdiction over the tort claim entailed insufficient potential for interference with the regulatory jurisdiction of the NLRB to counter balance the legitimate and substantial interest of the state in protecting its citizens. The *Farmer* Court cited with apporval its statement in *Vaca v. Sipes*, 386 U.S. 171 at 180 (1967) that the "decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the affect upon the administration of national labor policies of concurrent judicial and administra-tive remedies."

Linn v. Plant Guard Workers, 383 U.S. 53 (1966) further illustrates this point. A management employee sued a union, two of its officers and a bargaining unit employee for defamation based on statements made during an organizational campaign. If unfair labor practice charges had been filed, the Board might have found that the union violated §8 of the NLRA. Under a formalistic application of the *Garmon* rule, the defamation action could have been preempted. However, a number of factors influenced the Court to depart from the *Garmon* rule. First, the Court noted that the underlying conduct, that is, the intentional circulation of defamatory material known to be false, was not protected under the NLRA and there was thus no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect. Second, the Court recognized that there was "an overriding state interest" in protecting its residents from malicious libels and that this state interest was "deeply rooted in local

feeling and responsibility'' such that it fit within the exceptions specifically noted in *Garmon*. Third, the Court reasoned that there was little risk that the state cause of action would interfere with the affective administration of national labor policy as the exercise of state jurisdiction would be a ''merely peripheral concern of the LMRA.''

The State of California has expressed a substantial interest in the welfare of the workers within its state who suffer industrial injuries by enacting a comprehensive workers' compensation scheme. In its 1972 amendment to §132a of the Labor Code which is an integral of the Act, the Legislature states that: ''It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment.'' This broad declaration of state policy was accompanied by additional amendments to §132a to provide for criminal sanctions and the payment of a penalty under Labor Code §4553.

It is therefore submitted that an application of the *Garmon* — Farmer — *Linn* analyses does not require throwing out one of the cornerstones of the California Compensation Act. If as Dalgety argues its conduct which gave rise to respondent's §132(a) claim is arguably prohibited by the NLRA, there is no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect. The state's interest is obviously substantial in protecting its citizens who are injured in the course and scope of their employment from *all* discrimination. In light of the Legislature's most recent amendments in broadening the state's policy in this regard, and ensuring its implementation through criminal sanctions and penalties, the state's interest can accurately be characterized as ''deeply rooted in local feeling and responsibility'' such that it fits within the express excep-tions carved out by

Garmon. Even if Dalgety is correct in its contention that its conduct is "arguably prohibited" under the NLRA (a contention that will be addressed below), the potential for interference with the regulatory jurisdiction of the NLRB is insufficient to counter balance the legitimate and substantial interest of the state in protecting its citizens against discrimination because of an industrial injury. The State tribunals can assess the legal significance of the employer's conduct in light of §132a without making complex legal determinations under federal labor laws, and such judicial supervision of this conduct would not disserve the interests promoted by the federal labor statute.

It should be noted that the federal judiciary scheme itself recognizes the States' overriding interest and expertise in their workers' compensation laws by prohibiting the removal from State Courts suits based on such laws despite the exist-ence of diversity between the parties. See 28 U.S.C. §1445(c).

B. PROTECTIONS OF LABOR CODE SECTION 132a ARE NOT LOST OR BARGAINED AWAY.

Petitioner's second contention that the liability imposed on it by application of §132(a) of the California Labor Code violates federal law because it "nullifies the result of federally sanctioned collective bargaining" is equally without force.

The State of California has undertaken by legislation to impose on the employers within the state an obligation not to discriminate in any way against workers who are injured in the course and scope of their employment. This obligation applies with equal force to those employers who employ workers covered by a collective bargaining agreement as to those employers who employ workers who are not covered

by such an agreement. The state's workers' compensation scheme in no respect establishes a different standard of conduct for employers when the workers in their employ are covered by a collective bargaining agreement. Petitioner urges that "applying §132a in the manner Mrs. Avina desires would have the affect of giving to one party that which was bid for but lost in the collective bargaining *process*". The protection against discrimination afforded by §132(a) is not one susceptible of "loss" through the collective bargaining process. *Judson Steel Corp. v. Workers' Compensation Appeals Board*, (1978) 22 Cal.3d 658 at 665, fn. 5:

> Moreover, it is clear in any event that an employer may not defend a discriminatory employment practice, prescribed by §132a, on the basis of the provisions of a collective bargaining agreement, for a union may no more bargain away its members' statutory rights against discrimination under the workers' compensation law than it may bargain away its members' statutory rights against for example, sexual or racial discrimination. As the Court held in *Robinson v. Lorillard Corpation* (citation omitted): "The rights assured by Title VII are not rights which can be bargained away-either by a union, an employer or by both acting in concert".

Dalgety's reliance on the *Morton* and *Oliver* cases is also misplaced since Congress has not occupied the field of workers' compensation and closed it to state regulation. To the contrary, the state's are free to enact such benefit programs for the welfare of its citizens. As pointed out above, Congress has specifically recognized that the states have "occupied" this field in §1445(c) of 28 U.S.C. which prevents federal removal of a suit under state workers' compensation laws from State Court.

It is not disputed here that both state and federal legislative enactments often "alter" the terms of a collective bargain-

ing agreement between private parties, as have, for example, the minimum wage laws; mandatory overtime pay provisions; health and safety laws; the Employee Retirement Income Security Act (ERISA) of 1975; the laws proscribing racial discrimination which results from collectively bargained seniroity systems; the laws proscribing discrimination against women in the payment of medical benefits and granting of leaves of absence for pregnancy. State and federal legislatures, therefore, have imposed limitations on the solutions of a problem that parties to a collective bargaining agreement may reach. Frequently these limitations are in effect and provide a backdrop to negotiations, affording the parties considerable freedom to strike the best possible bargain consistent with state and federal substantive policies. With as much frequency, however, these limitations are changed or imposed after a collective bargaining agreement has been executed by the parties and the new obligations created by such legislative enactments are mandatory on the parties despite the existence of a collective bargaining agreement and to some extent the obligations of such agreement are altered thereby. Section 132a of the Labor Code of California imposes just such a limitation on the parties to a collective bargaining agreement and such imposition is justified by the state's compelling interest in protecting its citizens against any discrimination due to an industrial injury. Like the other legislative enactments mentioned above, §132a is a law of general application which imposes the same obligation on all employers and offers the same protection to all workers, whether a collective bargaining agreement establishes the general terms and conditions of employment between such employers and employees or not. This Court's admonition in *Judson* bears repeating: these statutory rights and obligations may not be bargained away.

C. NO "ARGUABLY PROHIBITED CONDUCT.

Dalgety contends that its conduct which gave rise to Mrs. Avina's claim for relief under §132a is "arguably prohibited" by the NLRA and, therefore, such claim is automatically preempted by the primary jurisdiction of the Act. However, as respondent has shown a finding that conduct is "arguably prohibited" does not result in automatic reemption but rather is the predicate for a balanced inquiry as to the nature of the federal and state interest involved and the extent to which state jurisdiction would interfer with the federal regulatory scheme. When the state's interest is substantial and compelling and the interference minimal, preemption is denied.

Of course a determination as too the applicability of the preemption doctrine to the case at hand is only required if the necessary predicate is established. That is, if the court beleives that the conduct challenged by Mrs. Avina's claim for relief under §132a is "arguably prohibited" under the NLRA as Dalgety contends.

Dalgety asserts that the NLRB has "intimated" in two cases decided in late 1982 that employer conduct which penalizes an employee for an industrial injury or limits the employee's right to invoke workers' compensation proceedings may violate §8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1). In neither of the cases cited by Dalgety does the NLRB hold that a discharge of an employee by his employer for exercising his rights under workers' compensation laws is violative of the NLRA. In fact, in *Grumman Flexible Corp.*, 264 N.L.R.B. No. 34 (September 28, 1982) the Board prefaced its finding that an employer had fired a probationary employee for a poor attendance record rather than from a desire to protect its workmen's compensation liability by "assuming, arguendo, that the (employee's) request for workmans' compensation papers was 'protected

activity'."

Dalgety cites no authority for its contention that employer conduct which violates Labor Code §132a is "arguably prohibited" by the NLRA. Of particular interest, however, is the 1980 decision of the Fourth Circuit of the United States Court of Appeals in *Krispy Kreme Doughnut Corp. v. NLRB* which petitioner cites in footnote 5 at page 9. The Fourth Circuit denied enforcement of NLRB's cease and desist order requiring reinstatement of an employee with back pay made pursuant to a finding that the discharge of the employee by the employer violated §8(a)(1) of the National Labor Relations Act, 29 U.S.C. §151, *et seq*. The Court held that the discharge of an individual employee for refusing to forego a workmens' compensation claim did not violate §8(a)(1) of the NLRA since the activity of the employee did not constitute protected "concerted" activity, which the Court emphasized is an essential predicate, in effect a jurisdictional requirement, for NLRB action under the Act. Petitioner cites no NLRB case during the 47 years period since the Act first described what employer conduct constitutes an unfair labor practice charge which declares the type of employer conduct challenged herein to be an unfair labor practice charge under the Act and, of necessity without such a decision, cites no Appellate Court authority sustaining the NLRB's assertion of jurisdiction whether its statu-tory mandate. There is only the Circuit Court decision in *Krispy Kreme*, which if applied to the facts of the case at hand would preclude the NLRB's successful prosecution of an unfair labor practice charge against petitioner, assuming, of course, that the NLRB would determine the issuance of a complaint based on respondent's claim of an NLRA violation was appropriate.

Respondent submits that Dalgety has not presented this Court with any authority in support of its contention that

the conduct challenged in respondent's §132a claim is "arguably prohibited" by the NLRA so as to warrant a further determination of the appropriateness of preemption in light of the compelling interest of the state in protecting its citizens from this type of challenged employer conduct.

IV. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE WORKERS' COMPENSATION JUDGE'S DECISION. DEFENDANTS EX POST FACTO ARGUMENT IS WITHOUT MERIT.

As recounted in the Statement of Facts, Mrs. Avina returned to her old job at Dalgety for four months prior to her discharge. After her discharge, she found similar employment elsewhere. Dalgety contends that the Workers' Compensation Judge relied on Mrs. Avina's ability to return to work *after* her discharge as evidence that she was not a danger to the work place. Dalgety's argument then runs to the effect that the Judge's consideration of facts occurring after the discharge violated the constitutional prohibition against Ex Post Facto laws in that Dalgety could not have been aware of those facts at the time of the discharge.

Dalgety's Ex Post Facto argument does not survive inspection of the record. The Workers' Compensation Judge states in his "Report and Recommendation on Petition for Reconsideration", the basis for his finding that Mrs. Avina was not a danger to the work place:

> ". . . On the issue of the substantiality of the evidence, I relied on the opinion of Dr. Storey at the trial that there was no such risk of further injury nor was the applicant unable to do such work. I also relied on her testimony of performance *at Dalgety* up until the off work fall." (Emphasis added).

Thus the Judge states that the basis of his finding that Mrs. Avina was not a danger to the work place was her job

performance *prior* to discharge. Further, Mrs. Avina worked *at Dalgety* during this period. Dalgety therefore had ample opportunity to observe her performance. The fact that she later worked at another location does not retroactively excuse Dalgety for its intentional ignorance.

Also, the thrust of Dalgety's fanciful "ex post facto" argument is that the employer is being "penalized". It is axiomatic that the penalty provisions of the Labor Code do not impose true "penalties" but rather additional compensation for the wronged employee and are therefore subject to the liberal interpretation rule of Labor Code §3202. E.g., *Judson Steel*, supra. The modest recovery Mrs. Avina will receive, if the litigation in this case ever ends, will hardly come close to compensating her for the hardship caused by her wrongful dischrge — and perpetuated by the employer's filing of frivolous appeals such as this one.

CONCLUSION

For the reasons stated above, it is respectfully requested tht Dalgety's petition for hearing be summarily denied and the matter remanded for an award of sanctions and attorney's fees pursuant to Labor Code §5801.

Dated: 1-28-83

Respectfully submitted,
RUCKA, O'BOYLE & LOMBARDO
A Professional Corporation
By: /s/ ALFRED LOMBARDO
ALFRED LOMBARDO
Attorneys for Respondent
Angelina Avina

VERIFICATION

I, the undersigned, say:

I am one of the attorneys for applicant, ANGELINA AVINA; that the foregoing document is true of my own knowledge, except as to the matters which are therein stated upon my information or belief and, as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of January, 1983, at Salinas, California, 93906.

/s/ ALFRED LOMBARDO
ALFRED LOMBARDO

PROOF OF SERVICE

I, the undersigned, say:

I am now and at all times herein mentioned a citizen of the United States, over the age of eighteen years, a resident of Monterey County, California, and not a party of the within action or cause; that my business address is 245 West Laurel Drive, Salinas, California, 93906.

I served the within ANSWER TO PETITION FOR HEARING by placing a true copy in an envelope addressed to:

Littler, Mendleson, Fastiff & Tichy
1925 Century Part East, Suite 850
Los Angeles, California 90067

Honorable William R. Butler
Workers' Compensation Appeals Board
21 West Laurel Drive, Suite 69
Salinas, California 93906

Court of Appeal
First Appellate District
350 McAllister Street

San Francisco, California 94102

Workers' Compensation Appeals Board
RECON
P. O. Box 6759
San Francisco, California 94101

Mission Insurance Company
P. O. Box 5219
San Jose, California 95150

State Compensation Insurance Fund
P. O. Box 759
San Jose, California 95106

Hartford Accident and Indemnity Company
P. O. Box 5986
San Jose, California 95150

which envelope was then sealed and, with postage fully prepaid thereon was, on January 28, 1983, desposited in the United States Mail at Salinas, California, 93906; that there is delivery service by United States Mail at the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of January, 1983, at Salinas, Califrnia, 93906.

/s/ JANICE M. PRICE
JANICE M. PRICE

APPENDIX HH.

Supplemental Exhibits to Petition for Hearing [by Dalgety Foods, Inc.] (January 28, 1983).

In the Supreme Court of the State of California.

Dalgety Foods, Inc., Petitioner, v. Workers' Compensation Appeals Board, et al., Respondents. Case No. ....., Court of Appeal No. A020025.

Filed: January 28, 1983.

Pursuant to the request of the Court, Petitioner Dalgety Foods, Inc. hereby submits copies of the following three cases cited on page 9 of its Petition for Hearing:

Farrens Tree Surgeons, Inc.
264 N.L.R.B. No. 90 (September 30, 1982)

Grumman Flexible Corporation
264 N.L.R.B. No. 34 (September 28, 1982)

Ohio Brass Company
261 N.L.R.B. No. 18 (April 13, 1982).

Dated: January 28, 1983.

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation

By: /s/ Robert L. Zaletel
ROBERT R. ZALETEL

Attorneys for Petitioner
DALGETY FOODS, INC.

EXHIBIT 2.

DECISION AND ORDER.

VFZ

264 NLRB No. 90 D—9335

Jacksonville, FL

United States of America Before the National Labor Relations Board.

Farrens Tree Surgeons, Inc. and Stephen F. Parr, an Individual. Case 12—CA—9828.

On July 15, 1982, Administrative Law Judge Richard J. Linton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

In its exceptions and brief, Respondent requests that it be awarded attorney's fees pursuant to *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), and the Equal Access to Justice Act.[1] Under *Tiidee Products*, the Board may order certain extraordinary remedies, such as the payment of attorney's fees, if it determines that a party has engaged in frivolous litigation. See also *Heck's Inc.*, 215 NLRB 765, 767—768 (1974). We cannot conclude that the present case constitutes frivolous litigation. We note that the Adminis-

[1] 5 U.S.C. § 504.

trative Law Judge's ultimate conclusion that Respondent did not violate the Act was based, in part, on his credibility resolution with respect to the testimony of Stephen Parr. If the Administrative Law Judge had viewed the evidence differently or had made contrary credibility findings, a violation of the Act may have been established.

As for Respondent's request for attorney's fees under the Equal Access to Justice Act, we find that it is premature and otherwise not in compliance with the procedural requirements for applying for an award of fees and expenses as set forth in Sections 102.143 through 102.155 of the Board's Rules and Regulations, Series 8, as amended.[2] Accordingly, Respondent's request for fees and expenses under the Equal Access to Justice Act is not properly before us and we will not consider it at this time.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. September 30, 1982

John R. Van de Water, Chairman

John H. Fanning, Member

Don A. Zimmerman, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[2]For example, Sec. 102.148(a) of the Board's Rules and Regulations states that an application for an award of fees and expenses must be filed within 30 days after the entry of the Board's final order in a proceeding.

DECISION.

JD—(ATL)—57—82
Jacksonville, FL

United States of America Before the National Labor Relations Board, Division of Judges, Branch Office Atlanta, Georgia.

Farrens Tree Surgeons, Inc. and Stephen F. Parr, an Individual. Case 12-CA-9828.

John C. Wooten, Esq., Tampa, FL, for General Counsel.

Michael K. Grogan, Esq., Jacksonville, FL, for Respondent.

Stephen F. Parr, De Land, FL, *pro se*.

RICHARD J. LINTON, Administrative Law Judge

Statement of the Case

This case was tried before me in Jacksonville, Florida, on April 1, 1982 pursuant to the October 9, 1981 complaint issued by the General Counsel of the National Labor Relations Board through Acting Director for Region 12 of the Board. The complaint is based upon a charge filed August 25, 1981 by Stephen F. Parr (Parr or Charging Party) against Farrens Tree Surgeons, Inc. (Respondent or Farrens).[1]

In the complaint, General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating employees through a certain question on its employment application form, by threatening employees with unspecified reprisals if they elected to pursue protected activities, and Section 8(a)(1) of the Act by discharging Parr

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[1]*Sua sponte*, I have spelled "Farrens" as shown, thereby deleting an apostrophe, in order to conform the spelling of Respondent's pleadings and the documentary evidence.

on August 16, 1981 because he filed a Workers Compensation claim.[2]

By its answer, Respondent admits certain factual matters, but denies that it has violated the Act.

Upon the entire record, including my observation of the demeanor of ther witnesses, and after due consideration of the brief filed by Respondent, and General Counsel's motion to dismiss the complaint, I make the following:

Findings of Fact

I. Jurisdiction

A Florida corporation headquartered in Jacksonville, Florida and doing business in De Land, Florida and in various states outside Florida, Farrens is engaged in the business of providing tree removal and tree cutting services to public utilities and other customers. During the past 12 months, Respondent furnished services valued in excess of $50,000 to customers at points located outside the state of Florida. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Alleged Unfair Labor Practices

A. *Procedural Matters*

At the close of the hearing, the due date for briefs was set for May 4, 1982 (TR 276). Thereafter, Counsel for General Counsel (CGC) requested that the time in which briefs could be filed be extended until June 4, 1982 because of "recent developments." Respondent had no objection. By order dated April 28, 1982, the due date for briefs was extended to June 4, 1982.

In his May 28, 1982 motion, Counsel for General Counsel requests that I "Approve Withdrawal of Charge, Dismiss

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[2]All dates are for 1981 unless otherwise indicated.

Complaint and Terminate Proceeding." Attached to the motion is a withdrawal request signed by Parr on May 16, 1982.

In his motion to dismiss, and after summarizing the complaint allegations, Counsel for General Counsel asserts:

> 3. The Complaint allegation [paragraph 4][3] relative to interrogation through the use of questions on the employment application concerning the exercise of the right to file Worker's Compensation for an on the job injury was predicted upon the theory that an Employer inquiry into an employee's past exercise of concerted, protected activity on an application form without a legitimate and substantial business justification is a violation of Section 8(a)(1). [Citations omitted.]
>
> * * *
>
> On April 13, 1982, just 13 days after the hearing closed in the instant proceeding, the Board issued its decision in *Ohio Brass Company*, 261 NLRB No. 18 in essence holding that an inquiry into an applicant's history of personal injury was one the employer was privileged to ask. Accordingly, General Counsel is bound by the decisions of the Board and this allegation of the Complaint cannot be sustained.
>
> * * *
>
> 5. Charging Party has now been made aware of the Board's decision in *Ohio Brass, supra*, and does

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[3]Complaint paragraph 4 reads: "Since on or about February 26, 1981, Respondent, acting through David O'Quinn, has interrogated employees about their concerted protected activities by maintaining and enforcing an employment application which questions employees about their past protected concerned activities."

Respondent's employment application form (G.C. Exh. 2; Resp. Ex. 2a) contains, as question 15, (Have you ever) "Drawn Workmen's Compensation? _____ If yes, describe _____ ."

After General Counsel rested, CGC advised that his evidence in support of Complaint paragraph 4 is question 15 of Respondent's employment application form (TR 100).

> not wish to pursue the matter further and has requested withdrawal of the Charge. Counsel for General Counsel, in view of the limited impact of the case and the fact that organizational rights are not involved, would recommend approval of the withdrawal request tendered and attached to this Motion.

Counsel for General Counsel concludes by requesting that I approve the request to withdraw the charge, "Dismiss the Complaint and Terminate this Proceeding."

In addition to its 42-page brief of June 3, 1982, addressing the merits of the case, Respondent has filed its motion, dated as its brief, responding to General Counsel's motion to dismiss. Farrens contends that the complaint "should be dismissed in its entirety with prejudice" and that such dismissal, based upon the arguments set forth in its brief, "should constitute a complete and final adjudication upon the merits . . . ." Finally, Respondent asserts:

> 4. By agreeing to a post-hearing dismissal of the Complaint in its entirety, Respondent does not waive and hereby preserves its right to recover the substantial costs and attorneys fees incurred in defending this matter.

Respondent concludes its response with the request that I dismiss the complaint in its entirety "and award costs and attorneys fees to Farrens."

I deny Respondent's motion that I grant costs and attorneys fees. To the extent that such is based upon this proceeding, neither the facts nor the law warrant such an award. If the request is based upon other authority, it is premature.

I hereby grant General Counsel's motion to dismiss the complaint — but only as to paragraph 4. As for the balance of the complaint (paragraph 5, threat of reprisals, and paragraph 6, discharge of Parr), I shall dispose of them as to the merits.

B. *Complaint Dismissed*

Complaint paragraph 5 alleges that on or about May 29, 1981, "Respondent, acting through David O'Quinn, at the Charging Party's residence, threatened an employee with unspecified reprisals if its employees elected to engage in concerted protected activities."

Complaint paragraph 6 alleges that on or about August 16, 1981, Respondent "discharged Charging Party because he filed a Worker's Compensation claim."

General Counsel's only witness was Parr. Respondent called Parr, Director of Safety Gene Osborne, Claims Manager George Mecke, General Foreman David O'Quinn and Foreman Grady Alan McGhee.

At the trial, I observed the witnesses closely. The demeanor of Parr was unsatisfactory and unpersuasive, and I find him to be an unreliable witness. In contrast, the demeanor of Respondent's witnesses was persuasive and I credit them.[4]

The gist of Parr's testimony regarding Complaint paragraph 5 is that on May 28, 1981, O'Quinn came to Parr's home, where Parr was resting in bed following his having sustained an on-the-job injury to his right knee, and asked Parr if there was any way Parr could return to work and just flag traffic so O'Quinn would not have to fill out the Workers Compensation forms. O'Quinn denies making such a request (TR 252, 256). Because of O'Quinn's more persuasive demeanor, and based upon the record evidence, I credit O'Quinn. Finding that O'Quinn did not make the statement, I shall dismiss Complaint paragraph 5.

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[4]This is not to say that I credit every minor detail of their testimony over Parr. But I do credit them in all substantial and material respects over Parr.

Respecting Parr's discharge, it is undisputed that on August 16 Parr telephoned O'Quinn and advised that the doctor had released him (following) surgical repair of Parr's knee) to return to work on August 17. O'Quinn told Parr that his services would no longer be needed and that he was terminated for having falsified his employment aplication by stating therein that he had never incurred a prior back injury.

Parr admits he answered the application question (number 16, "Ever injured your back?" in the negative (TR 66), and testified (TR 52):

Q. Well, have you ever had a back injury?
A. Nothing I never considered n injury, no, sir.
Q. Did you ever have any—have you ever had any problem with your back at all?
A. No, not really, no.

Parr then testified that he did not consider a back strain, incurred while working for the Florida Highway Department in 1975, to be a back injury, and that the doctor on that occasion simply told him to apply a hot pack to his back and rest.

Respondent contends that as of Parr's August 16 termination, it had received a report (Resp. Exh. 12a) from an insurance adjusting company that Parr had sustained a back injury in December 1978 and was "again seen in April 1979 for his back." Osborne and Mecke testified that the decision was made that Parr be terminated for falsifying his employment application (as to no prior back injury), a dischargeable offense, and for in fact having a history of back injuries. The record reflects that these grounds are supported by a consistent past practice. Osborne credibly testified that Parr would never have been hired had Respondent known of his prior back injury (TR 137).

Although it could be argued that the report Respondent had received on Parr which led to the decision to terminate

was less than substantial, and the decision to terminate therefore in bad faith (i.e., because Parr had filed a Workers Compensation claim), I credit Osborne and Mecke that the decision was based solely on the two considerations listed above. Moreover, the record reflects that Respondent's decision is consistent with Respondent's past practice. Finally, the testimony makes clear that the nature of Respondent's work performed by employees such as Parr is very heavy and very dangerous. It therefore is understandable why Respondent has an absolute rule not only against hiring anyone with a history of back problems, but also firing someone already on the payroll when it discovers that he has such a history.[5]

In light of the foregoing, I shall dismiss the complaint in its entirety.

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent has not violated the Act as alleged.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[6]

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[5]As Farrens did with employee Jimmy K. Haggard on April 11, 1981 (Resp. Exh. 9c; TR 229-232, Mecke).

[6]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order Herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

The complaint is dismissed in its entirety.

Dated at Washington, DC July 15, 1982.

/s/ Richard J. Linton
Richard J. Linton
Administrative Law Judge

EXHIBIT 3.

DECISION AND ORDER.

VFZ

264 NLRB No. 34 D—9292

Loudonville, OH

United States of America, Before the National Labor Relations Board.

Grumman Flxible Corporation[1] and Elvis Mitchell Gilt, an Individual. Case 8—CA—13490.

On September 25, 1981, Administrative Law Judge Russell M. King, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge only to the extent consistent here-

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[1]Respondent's name has been misspelled throughout the Administrative Law Judge's Decision. The correct spelling is as indicated above.

[2]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

with,[3] and to adopt his recommended Order, as modified.

The Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by discharging employee Elvis Mitchell Gilt "solely because he expressed an intention to file a workmen's compensation claim." Assuming, *arguendo* that Gilt's request for workmen's compensation papers was protected activity, we disagree with the Administrative Law Judge's finding that Gilt's discharge was motivated by Respondent's desire to protect its workmen's compensation liability.[4] As the Administrative Law Judge found, Gilt was either tardy or absent a total of 11 days during his 31-day term of employment with Respondent. Prior to reporting any ear discomfort, Gilt had already been recorded tardy or partially absent on six occasions. During that time he had been cautioned by his supervisor, Mike Nussbaum, to improve his attendance record. Later, in a November 28, 1980, progress report, Nussbaum cited the need for improvement in Gilt's attendance and, in issuing

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[3]We agree with the Administrative Law Judge that it is improper to consider the validity of Respondent's 1980 solicitation and distribution rules since their validity was not fully litigated. We therefore find it unnecessary to determine whether the rules are facially valid under the Board's standard in effect at the time of their issuance. In finding the 1978 rules violative, Chairman Van de Water does not rely on *T.R.W. Bearings Division, a Division of T.R.W., Ind.*, 257 NLRB No. 47 (1981). See his dissent in *Intermedics, Inc., and Surgitronics Corporation, a wholly owned subsidiary of Intermedics, Inc.*, 262 NLRB No. 178 (1982).

[4]The Administrative Law Judge considers significant Gilt's credited testimony that nurse Lois McDaniel told him that to pursue his claim would be "wasting his time and [he] would never win." The Administrative Law Judge interprets this statement to convey a message of the futility of seeking benefits in the face of Respondent's strong interest in protecting its liability. However, the remark is open to another at least equally plausible interpretation — that based on her familiarity with Gilt's symptoms and work envorinment, she did not consider the condition to be work-related. Moreover, regardless of the import of McDaniel's statement, it is not entirely clear that she was as agent of, and thus speaking on behalf of, the Respondent.

the report, counseled Gilt personally on the matter. The report did approve Gilt's retention, but Nussbaum, who had never previously caused the termination of a probtionary employee, consulted with Gilt's other supervisor, Robert Grennell, and both supervisors subsequently raised the issue of termination with the personnel department. As the Admistrative Law Judge notes, several other probationary employees had been fired for poor attendance records. Under these circumstances, we conclude that Gilt's discharge was motivated not by his expressed intention to file a workmen's compensation claim but by his poor record of attendance.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Grumman Flxible Corporation, Loudonville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph 1(d).

2. Delete paragraph 2(b) and (c).

3. Substitute the attached notice for that of the Administrative Law Judge.

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[5]The General Counsel excepts to the Administrative Law Judge's finding that a question in Respondent's employment application concerning prior workmen's compensation claims did not violate Sec. 8(a)(1) of the Act. In *Ohio Brass Company*, 162 NLRB No. 18 (1982), the Board found no violation in a similar job application inquiry, deeming it "a pertinent question bearing upon the applicant's history of personal injury."

Member Zimmerman concurred in that decision on the ground that the mere inquiry into the filing of past claims cannot be found unlawful in the absence of evidence of unlawful motive. Here no such unlawful purpose is involved in the inquiry.

Dated, Washington, D.C. September 28, 1982

John R. Van de Water, Chairman

John H. Fanning, Member

Don A. Zimmerman, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT maintain an invalid no-distribution rule which prohibits employees from distributing written or printed matter of any description on company premises at any time, with or without the specific authority of management.

WE WILL NOT maintain an invalid no-solicitation rule which prohibits unauthorized solicitation for any purpose whatsoever on company premises.

WE WILL NOT enter into any labor agreement with the United Steelworkers of America, AFL-CIO, CLC, which restricts the posting of notices or the distribution of any kind of literature on company property other than the posting of official union notices on union-installed and union-maintained bulletin boards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guranteed them in Section 7 of the National Labor Relations Act.

GRUMMAN FLXIBLE CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed

to the Board's Office, Anthony J. Celebrezze Federal Building, Room 1695, 1240 E. 9th Street, Cleveland, Ohio 44199, Telephone 216-522-3126.

DECISION.

JD-474-81
Loudonville, OH

United States of America Before the National Labor Relations Board, Division of Judges.

Gruman Flexible Corporation, Respondent Employer and Elvis Mitchell Gilt, An Individual Charging Party. Case No. 8-CA-13490.[1]

Patricia E. Ravenscraft, Esq., of
Cleveland, OH, for the General
Counsel.

James G. Bolton, Esq., of
Delaware, OH, for the Respondent
Employer.

RUSSELL M. KING, JR., Administrative Law Judge: This case was heard by me in Mansfield, Ohio on October 8 and 9, 1980. The charge was filed by the individual Gilt against the Respondent Employer (the "company") on January 14, 1980. A complaint was issued February 29, 1980 by the Regional Director of Region 8 of the National Labor Relations Board (the "Board"), on behalf of the Board's General Counsel, and the complaint (as amended during the hearing) alleges, *inter alia*, the discriminatory discharge of Gilt on December 6, 1979,[2] because he had previously expressed an intent to file a workmen's compensation claim in violation of Section 8(a)(1) of the National Labor Re-

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[1]Originally consolidated with this case for hearing was Case No. 8-CA-13769, involving the individual charging party Isaac Sturgeon. The General Counsel's unopposed motion to sever that case was granted at the commencement of this proceeding.

[2]All dates hereafter are in 1979 unless otherwise mentioned.

lations Act (the "Act").[3] The complaint further alleges the improper maintenance of rules restricting the use of company bulletin boards, and the improper maintenance of an overly broad no solicitation rule, in violation of Section 8(a)(1) of the Act. The complaint also alleges that the company improperly "maintained", through contract provisions, overly restrictive use and posting rules in connection with bulletin boards installed on company premises by the United Steel Workers of America, AFL-CIO, CLC (the "union"), in violation of Section 8(a)(1) of the Act.[4] Lastly, the complaint alleges (by amendment during the hearing) that the company improperly included a question regarding the receipt of "compensation or insurance for a work injury" in its employment application, in violation of Section 8(a)(1) of the Act. The company generally denies the allegations and alleges that Gilt was discharged for good cause (tardiness and absenteeism).

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel and the Respondent, I make the following:

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[3]The pertinent parts of the Act involved in this case are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. . .

* * *

Sec. 7. Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

[4]The union represents the company's production employees and its contract with the company contained the alleged objectional provisions. No charge was filed against the union in this case.

Findings of Fact[5]

1. Jurisdiction

The pleadings and admissions herein establish the following jurisdictional facts. The Respondent is and has been at all times material herein a corporation duly organized and existing under the laws of the State of Delaware, with a place of business or plant in Loudonville, Ohio, where it is engaged in the manufacture of transit buses. Annually, in the course and conduct of its business operations, the Respondent ships goods valued in excess of $50,000 directly to points outside the State of Ohio. Thus, and as admitted, I find and conclude that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Alleged Labor Practices

A. *Summary of the Testimony and Evidence*[6]

Testimony of employee Elvis Gilt

Elvis Mitchell Gilt testified that he had been employed by the company as sawer-trimmer (or "grinder") from October 22, 1979 until December 6, 1979, the day he was

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[5]The facts found herein are based on the record as a whole and upon my observation of the witnesses. The findings herein are in part based upon credibility resolutions which have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B. v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy or belief. All testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the *entire* record.

[6]The following includes a summary of the testimony of the witnesses appearing in the case. The testimony will appear normally in narrative from, although on occasion some testimony will appear as actual quotes from the transcript. The narrative only and merely represents a summary of what the witness themselves stated or related, without credibility determinations unless indicated, and does not reflect my ultimate findings and conclusions in this case. Not all documentary evidence admitted in the case is included or mentioned in the Summary, and references to such evidence will appear later herein.

discharged. He worked the second shift from 3:30 p.m. to 12 midnight and reported to supervisors Robert Grennell (supervisor of the second floor), or Mike Nussbaum (supervisor of the second floor) when Grennell wasn't there. Gilt described his duties as routing and grinding fiberglass bus parts, front enclosures, rear end enclosures, and two different types of side panels. The routing and grinding room was described by Gilt as covered with fiberglass dust, cold and without a heater. During rain, water would drip in his work room. Due to the type of work Gilt was engaged in, a particular clothing was required. He wore insulated underwear, heavy flannel shirts, blue jeans, a pair of coveralls and the company gave him a self-contained air helmet to wear for protection. According to Gilt the helmet was made out of plastic material that had a clear face mask over it and it had a cloth that came down that could be tacked inside of his shirt. A belt was strapped to his waist on which an air conditioning unit was strapped. The air conditioning unit pumped air into the helmet. Gilt indicated that air also came in from outside (outdoors) during the months of October, November and December. Gilt testified that prior to his employment with the company he had never sought medical help for an ear condition, but that during his employment with the company he visited the company's nurse (McDaniel) on November 19 and left work early. On November 20 he did not work and saw his wife's doctor, Dr. John Jentes who gave him a work excuse for leaving work early the previous day.

Gilt testified that subsequent to seeing Dr. Jentes he continued to experience discomfort with his ears and began to have an erratic work attendance record. Gilt related that on November 21 he did not work but went by the plant and spoke with supervisor Grennell who informed him to "do what the doctor told [him] to do", adding that "ears are an

important part of your body and you have to be extremely careful of the, and that he understood [his] feelings about not reporting to work, and he said he would see [him] the following day." The following two days (November 22 and 23) were Thanksgiving holidays and the following week Gilt reported timely for work Monday through Thursday, but on Friday (November 20) he left early because his ear hurt. Before leaving that day supervisor Nussbaum had changed his work area, but according to Gilt this change proved unsuccessful in alleviating his ear problems, and Nussbaum therefore told him to go home. Gilt also indicated that Nussbaum requested that he "get a medical slip from the doctor and. . .take [it]. . .to personnel the following Monday."

The following Monday (December 3) Gilt reported early to personnel and after waiting 40 minutes he spoke with one Judy Edwards in personnel about the conditions he worked under and about the possibility of a job transfer from the department he worked in.[7] Edwards told him that at the time there were no openings and he would "just have to bear it." Gilt then requested workmen's compensation from Edwards, who informed him that personnel did not handle such matters the nurse did. Prior to departing for the nurse's office Edwards said "Well, we hate to have to see you quit." Gilt then went to nurse McDnaiel's office, asked for the workmen's compensation papers and also gave McDaniel "the doctor's slip".[8] Gilt testified that McDaniel

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[7]Gilt arrived earlier than normal and thus did not "punch-in" timely because of a company policy, set forth in the employee handbook, that employees may not punch in more than 30 minutes early. Gilt's attendance record reflects that he worked 7.7 hours on December 3.

[8]The work excuse slip that Dr. Jentes had given Gilt on November 20, pertaining to his early departure from work on November 19, was admitted into evidence. The record, however, is uncertain as to whether this "doctor's slip" was the same. The slip from Dr. Jentes was the only one admitted in the case.

then told him "that it is worthless for [him] to do such a thing because [he] couldn't prove that [he] ever got the infection from working underneath the helmet, and [he] was just wasting [his] time." Gilt indicated he persisted in his request for the papers, explaining "that it was [his] choice" and McDaniel again responded that he would be "wasting [his] time because there would be a lengthy hearing and everything and [he] would never win." Gilt left without obtaining the workmen's compensation papers from McDaniel. Gilt then reported for work and soon thereafter spoke with supervisors Nussbaum and Grennell regarding his unsuccessful attempts to transfer to another department, and again requested workmen's compensation papers. According to Gilt this request was disregarded, and Nussbaum told him to go back to work.

On Thursday, December 6 supervisor Nussbaum informed Gilt that personnel had decided to discharge him. Gilt asked why and Nussbaum replied that he should talk to personnel officer Furman Manley. Gilt made an appointment with Manley December 10 and at that time, according to Gilt, Manley stated that his dismissal was due to poor workmanship and grinding too many parts. In January 1980, with the help of the union, Gilt file a workmen's compensation claim and eventually did receive some money as a result of his claim. Gilt also filed a grievance on December 11 over his discharge. The grievance reached the third step of the grievance procedure and was again denied by the company on January 29, 1980.[9] The reason given for Gilt's discharge was his tardiness and absenteeism.[10] On February

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[9]The union contract with the company provided for a 4-step grievance procedure, with the 4th step being arbitration.

[10]Gilt's attendance records indicated he was discharged for "unsatisfactory probation period."

8, 1980, the union withdrew the grievance.[11]

Gilt testified that he was tardy 6 or 7 times, and indicated one was due to his wife's pre-natal examination, another for car repairs, and several other (3 or 4 minutes) were due to parking problems outside the plant.[12] During his testimony Gilt also identified his employment application which includes the question "Have you ever applied for or received compensation or insurance for a work injury?"[13]

Testimony of employee Edward Safran

Edward Safran, who was president of the union local, had worked for the company for 10 years. Safran testified that the normal termination period for probationary employees, such as Gilt, was their last week or 41st through 45th day.[14] According to Safran, industrial relations representative Furman Manley justified Gilt's early dismissal by citing his poor work quality. Safran testified, however, that during the second and third steps of Gilt's grievance proceedings the company held steadfast with their position that the reason for Gilt's termination was absenteeism.

Safran identified the union contract with the company which commenced August 27, 1977 and expired August 10,

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[11]The charge in this case had already been filed (on January 14, 1980).

[12]Gilt's formal attendance record, although difficult to understand in some places, reflects that he was tardy 6 or 7 times (4 times by 6 minutes, once by 18 minutes, and once by approximately 90 minutes).

[13]The application was admitted into evidence, and Gilt answered the question "No."

[14]There was an exception in the electrial department.

1980.[15] Safran testified regarding the company's no solicitation rule as set forth in the company's rules of conduct.[16]

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[15]Article XXIII is entitled Bulletin Boards and reads as follows:

SECTION 1

The Union may install nine (9) lockable bulletin boards, at the Loudonville facility and one (1) lockable bulletin board at the Millersburg facility, in mutually agreed upon locations, to be used by the Union for the posting of official Union notices. The Local Union president shall designate, by written notification to the Company's Industrial Relations Department, the name of the Union Officer who is authorized to post such notices at each facility. Prior to posting, the designated Union Officer shall present to the Industrial Relations Department a copy of the notice to be posted.

SECTION 2

The Union notices shall be used only for the purpose of notifying employees within the bargaining unit of official Union business, and shall not be used for, or directed to, employees outside the Bargaining Unit; nor shall such Union notices be used for organizational activities or Union membership solicitation. Further, there shall be no controversial matter contained in any notice the Union desires to post.

SECTION 3

There shall be no other posting of notices by employees, nor other general distributions of pamphlets, advertising, political matter, or any other kind of literature upon Company property other than that herein provided.

A new contract was entered into August 29, 1980. Slight changes were made to Sections 1 and 2, and Section 3 was excluded.

[16]These rules, entitled "Rules of Conduct", were dated January 1978 and were admitted into evidence. Under Shop Rules, Group B, the following is prohibited: "Distributing, posting (or removal) of notices, signs, literature, petitions, written or printed matter of any discription on bulletin boards or company premises at any time without the specific authority of management." Under Shop Rules, Group C, the following is prohibited: "Unauthorized soliciting or collecting contributions for any purpose whatsoever on Company premises." Under the Group C Rules, employees were "subject to discharge" on the first offense. Under Group B Rules, the first offense carried a written warning, second offense a 5-day suspension, and third offense "subject to discharge." In June 1980 the company issued new Rules of Conduct which contained the following regarding Solicitation and Distribution:

> Distribution of printed matter or solicitation for any purpose by non-employees on the Company premises is not permitted at any time. Any visitor engaged in solicitation or distribution will be required to leave Company premises immediately.
>
> Solicitation by employees or the collection of contributions for any purpose (civic, charitable, political, etc.) is not permitted during working time. Working time includes either the working

According to Safran the rules of conduct had been and were currently in effect and he indicated that a point system was applied to non-probationary employees, as opposed to probationary employees. Safran also indicated that the company had a policy which permitted a supervisor to allow an employee, for real and compelling reasons, time off not to exceed five days.

Regarding injury records, Safran testified that he at one time had free access to all such records. This policy was then changed to deny him access to any records, but later he was granted permission to see such records regarding employees that had requested his representation.

Testimony of Industrial Relations Manager Willhite

Joel Willhite testified as the company's present Manager of Industrial Relations, indicating that both Industrial Relations Representative Furman Manley and supervisor Bob Grennell were no longer with the company. According to Willhite, Manley was terminated in January 1980 and Grennell resigned because of health reasons in April or May of 1980, and now resides in Florida. Willhite testified that during Gilt's employment (October 22 to December 6) he was tardy on 7 occasions, and absent 2 partial days and 2 full days due to illness, adding that only one partial day was "verified by a doctor." Willhite further testified that Gilt was tardy or absent 11 days out of the 31 days he was

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time of the employee doing the soliciting or the employee being solicited.

Distribution of literature, petitions or printed matter of any kind by employees is not permitted in working areas at any time.

Group B of new Shop Rules prohibits "Posting (or removal) of notices, signs, literature, petitions, written or printed matter of any description on bulletin boards or Company premises at any time without the specific authority of management." Group C of the new Rules prohibits "Distribution of printed matter, solicitation or collecting contributions in violation of the Rules of Conduct."

employed. Willhite maintained that the company's position regarding Gilt was that his "attendance record was not acceptable, and therefore he was terminated.

Testimony of Supervisor Michael Nussbaum

Michael K. Nussbaum would, on occasion, supervise Gilt. According to Nussbaum he received only favorable comments about the type of hood Gilt used on the job, and no employee ever complained of any physical discomforts, physical injury, sickness or ill heath because of wearing the hoods. Nussbaum also denied that Gilt had ever asked him for any compensation forms.[17]

Testimony of Nurse Lois McDaniel

The company's industrial nurse Lois Marie McDaniel testified that Gilt made a request to her to have his position changed, indicating that he was having problems with the hood and had ear problems. She then informed him of the requirement of written documentation from a doctor before she could make any recommendations. According to McDaniel, Gilt also stated he "wanted to file a workmen's compensation form" for payment of his medical bills regarding his ear infection. McDaniel indicated she then informed Gilt that she "would be happy to file a claim for him, but it would be unusual and therefor it would probably be the Company's position that it would be set for hearing." Gilt later filed a workmen's compensation claim and according to McDaniel she then contacted and talked with

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[17]Nussbaum had completed a "Probationary Period Progress Report" on Gilt dated November 28, which was admitted into evidence. This progress report noted that Gilt showed interest in his job, noted "average" work performance (adding "improvement can be made"), and indicated Gilt was "cooperative." The report also noted under attendance "improvement expected (tardiness)", and recommended Gilt's retention "with improvement in attendance and performance."

Carmen Hall, who subsequently forwarded a memo to her indicating that Gilt's ear problems had not been "industrial related."[18] McDaniel testified that the company ultimately paid $12 on Gilt's claim and this was paid by computer error of their "actuary" company.

On cross-examination McDaniel indicated that the company was "self-insured" regarding workmen's compensation payments, but if a claim was deemed meritorious the company would pay the claim directly. McDaniel added that although the company voluntarily paid some claims, she informed Gilt that the reason his claim would not be paid by the Company was due to its classification as an "occupational disease" and the company's policy regarding these types of cases was to "set them for hearing." Regarding Gilt's ear problems, McDaniel did indicate that she suggested to Gilt that he wear a toboggan hat, and that Gilt disregard her suggestion.

B. *The Employment Application*

The company's employment application contained a question as to whether the applicant had "ever applied for or received compensation or insurance for a work injury?"[19] The complaint, as amended, alleges that the inclusion or presence of the question is a violation of Section 8(a)(1) of the Act.[20] Besides the actual existance of the question, there is no evidence in the record as to the company's reason or need for the question, other than the fact that the company

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[18]The memo was admitted into evidence. It was dated February 21, 1980 and is headed "From the desk of. . .John P. Jentes, M.D. [and] Daniel R. Daugherty, M.D." It was signed by Carmen Hall, as Insurance Clerk.

[19]The application also inquired as to "chronic ailments", "physical disabilities", "operations" and "severe illnesses."

[20]This allegation was inserted into the complaint by amendment during the hearing.

was self-insured. The Board has held that an employment application inquiry into employees' past concerted activities regarding union affiliation is violative of the Act.[21] The Board has also held that a claim for unemployment compensation is protected concerted activity,[22] as well as an expressed intent to file a workmen's compensation claim.[23] In its brief the General Counsel argues in this case that the question regarding claims both attempts to elicit information to be used as the basis of a hiring decision, and serves as a chilling effect to perspective employees not to file such claims should they be hired, thus having a reasonable tendency to coerce employees in the exercise of their rights. I disagree in this case. I am unwilling to draw such inferences or conclusions from the mere existance of the question on the application, without further evidence. In my opinion to do so would be an overly broad, blanket, and unwarranted extension of what the Board has considered as protected and concerted activities or acts. I thus find no violation of the Act regarding the existance of the "compensation or insurance" question on the employment application.

C. *The Discharge of Employee Gilt*

Paragraph 8 of the complaint alleges that Gilt was discharged in violation of Section 8(a)(1) of the Act because he "expressed an intention to file a claim with the Ohio Bureau of Worker's Compensation." As indicated earlier, the Board has held that such expressed intentions are pro-

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[21]*Boatel Alaska, Inc.*, 236 NLRB 1458, 99 LRRM 1005 (1978).

[22]*Self Cycle & Marine Distributor Co., Inc.*, 237 NLRB 75, 98 LRRM 1517 (1978).

[23]*Krispy Kreme Doughnut Corp.*, 245 NLRB No. 135, 102 LRRM 1492 (1979), citing *Self Cycle, supra*. Enforcement was denied by the Fourth Circuit in *Krispy Kreme*, sub nom. 105 LRRM 3407 (1980). This fact and other related matters will be discussed later in this Decision regarding Gilt's discharge.

tected concerted activity under the Act.[24] That Gilt expressed such intentions at least on Monday, December 3, is uncontested in this case. After 2 uneventful and full work days (December 4 and 5), Gilt was discharged on December 6.[25]

Gilt commenced his employment on October 22 as a probationary employee.[26] The company maintains that Gilt was either tardy or absent some 11 out of 31 working days, which constituted the sole reason for his discharge.[27] The record and evidence does support these contentions by the company regarding Gilt's attendance record.[28] However, on

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[24]*Krispy Kreme, supra*. The five-member Board (then Chairman Fanning and Members Jenkins, Penello, Murphy, and Truesdale) reasoned, as in *Self Cycle, supra*, that such benefits arise out of the employment relationship and are of common interest to other employees. The U.S. Fourth Circuit Court of Appeals felt differently and denied enforcement (635 F.2d 304, 05 LRRM 3407) citing, among other cases, *ARO, Inc.*, 596 F.2d 713, 101 LRRM 2153 (6th C.A. 1979). The initial decision in *ARO, Inc.* was authored by me, and on exceptions was reversed by the Board (227 NLRB 243, 101 LRRM 2153). The Sixth Circuit denied enforcement. Notwithstanding the foregoing it is my lot herein to consider *Krispy Kreme* as Board precedent, which I am bound to follows.

[25]Gilt filed a grievance over the discharge on December 11. On January 14, 1980 he filed the charge in this case. The grievance was denied at the third step of the grievance procedure, short of arbitration. On February 8, 1980 the grievance was withdrawn. The complaint issued in this case on February 29, 1980.

[26]The Union contract specified that all new employees were probationary employees, without seniority for "forty-five (45) consecutive work days." Gilts probationary period would have been up approximately December 30 (considering holidays).

[27]Gilt testified that personnel officer Manley later told him he was discharged for poor workmanship. Union president (and employee) Safran confirmed, in his testimony, Manley's stated reason for Gilt's discharge. Manley, no longer with the company, did not testify. The company's industrial relations manager Joel Willhite testified, without uncertainty, that the discharge was due solely to Gilt's attendance record. I take this to be the company's position in this case.

[28]The record and exhibits reflect that Gilt was late some 5 to 10 minutes on October 25 and November 2, 5 and 7. Gilt was also late October 31 and December 3. On December 3 he arrived early to go to personnel. He was too early to clock in but reported to work after he finished with personnel. On November 19 he left 2 hours early after seeing the nurse, for which he later obtained a doctor's excuse. Gilt did not report for work on November 20 and 21, and on November 30 he left 4 hours early at supervisor Nussbaum's suggestion.

November 28 supervisor Nussbaum completed and signed Gilt's "Probationary Period Progress Report", recommending Gilt's retention "with improvement in attendance and performance."[29] At this point Gilt was 6 working days from his discharge, and some 19 days short of the end of his probationary period. During the 6-day period Gilt left early on November 30 at supervisor Nussbaum's suggestion,[30] and on December 3 was some 15 minutes late actually checking in by virtue of having gone to the personnel office where he inquired about workmen's compensation forms.[31] Gilt worked full days in December 4 and 5.

I find in this case that Gilt was discharged solely because he expressed an intention of file a workmen's compensation claim.[32] Gilt was given only 6 days out of approximately 19 days to further prove himself, after his retention had been recommended. His early departure on November 30 was condoned by his supervisor and his late reporting on December 3 was not his fault. The company was self-insured for workmen's compensation and strongly protected its liability. As nurse McDaniel put it during Gilt's visit the early morning of December 3, Gilt would be "wasting [his]

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[29]The evidence reflects that other probationary employees during the year had been both rejected (several for poor attendance records) and retained.

[30]Gilt's attendance records reflect Nussbaum's suggestion to Gilt on November 30.

[31]Later on December 3 Gilt also asked supervisors Nussbaum and Grennell for workmen's compensation papers. He never received the papers or forms from the company and finally, aided by the union, he filed a claim in January 1980.

[32]In its defense in this case, the company never raised the issue of Gilt's ear problems, or the fact that this problem may have eventually rendered any employment with the company impossible. To have taken this approach may well have enhanced adversely the company's claim exposure. However, this is speculative and I make no such finding in this case.

time. . .and would never win."[33]

Having found that Gilt's expressed intentions to file a workmen's compensation claim resulted in his discharge, I am constrained to further find and conclude that under the Board's present law,[34] Gilt was discriminatorily discharged in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 8 and 10 of the complaint.

D. *The Company's Distribution and Solicitation Rules*

In January 1978 the company published its "Rules of Conduct" which contained, among other things, certain "Shop Rules" which carried penalties for their violation. Among these rules appeared the following violations regarding distribution and solicitation:

> Distributing, posting (or removal) of notices, signs, literature, petitions, written or printed matter of any description on bulletin boards on Company premises at any time without specific authority of management.
>
> Unauthorized soliciting or collecting contributions for any purpose whatsoever on Company premises.

In June 1980 the company published new "Rules of Conduct" which changed the word "Distributing", above, to "Posting" and replaced the above "Unauthorized" soliciation clause with simply the following:

> Distribution of printed matter, solicitation or collecting contributions in violation of the Rules of Conduct.

This replacement clause referred to a newly inserted section in the general rules section (as opposed to the "Shop Rules") which reads as follows:

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[33]Nurse McDaniel, in her testimony, denied these remarks claimed by Gilt, but did concede that she told Gilt the company ". . .would probably. . .set [the matter] for hearing." I credit Gilt over McDaniel here, and credit Gilt's testimony throughout this case.

[34]See *Krispy Kreme Doughnut Corp., supra.*

SOLICITATION AND DISTRIBUTION

Distribution of printed matter or solicitation for any purpose by non-employees on the Company premises is not permitted at any time. Any visitor engaged in solicitation or distribution will be required to leave Company premises immediately.

Solicitation by employees or the collection of contributions for any purpose (civic, charitable, political, etc.) is not permitted during working time. Working time includes either the working time of the employee doing the soliciting or the employee being solicited.

Distribution of literature, petitions or printed matter of any kind by employees is not permitted in working areas at any time.

There was no issue in this case regarding distribution and enforcement of the rules cited above and I thus find that they were duly distributed and enforced.[35]

Basic considerations regarding distribution and solicitation rules involve a proper adjustment between the undisputed right of self-organization assured employees under the Act and the equally undisputed right of employers to maintain discipline in their establishments.[36] A broad guide-

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[35]The record is simply void of any evidence on the subject except union president Safran's testimony that the new rules had not been submitted to the union. Safran was apparently referring to Article XXIV, Section 1 of the union contract with the company which reads as follows:

> The Company shall have the right to promulgate establish, alter, amend and enforce reasonable shop rules relating to the conduct and efficiency of employees and Company operations. Any additions or deletions will be provided to the Union Negotiating Committee for information purposes prior to the incorporation of such changes. The Union shall have the right to process a grievance on any rule changes or additions which they deem unfair.

There was also no evidence presented in the case as to whether the old or new rules were in any way clarified by the company to the employees.

[36]*Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793, 16 LRRM 620 (1945). The Court also added that the "dominant purpose" of the Act is the "right of employees to organize for mutual aid without employer interference."

line has been that so long as distribution was by employees to employees and in-plant solicitation was on "non-working" time, to prohibit the same in such cases might well be violative of the Act.[37] Until recently the Board distinguished between prohibitions during "working time" and during "working hours", holding that "working time" restrictions were valid on their face and "working hours" restrictions were invalid unless their impact on lunch and break time were clarified.[38] However, the Board recently held that both phrases ("working time" and "working hours"), without further clarification, were presumptively invalid.[39]

With the above basic guidelines in mind, I find that the January 1978 rules were in effect until 1980 and were violative of Section 8(a)(1) of the Act as alleged in paragraphs 5, 6 and 10 of the complaint. The rules were far from even ambiguous. They simply prohibited any and all distribution "at any time without specific authority of management", and any and all "unauthorized soliciting. . .for any purpose whatsoever on Company premises." I am not called upon in this case to make any findings regarding the 1980 Rules of Conduct, which were published after the issuance of the complaint but before the hearing in this case. The 1980 Rules prohibited distribution and solicitation only by "non-employees" and restricted employee solicitation to "working time." These rules, on their face, conformed to what

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[37]*N.L.R.B. v. Magnavox Company of Tennessee*, 414 U.S. 1109 85 LRRM 2475 (1974).

[38]*Essex International, Inc.*, 211 NLRB 749, 86 LRRM 1411 (1974). In this case, Members Fanning and Jenkins dissented and would have found both phrases, standing alone, to be ambiguous and invalid.

[39]*TRW Bearing Division, A Division of TRW, Inc.*, 257 NLRB No. 47 (1981) (by a three-member Board comprised by then Chairman Fanning and Members Jenkins and Zimmerman).

the Board's standard for validity was at the time.[40] Their validity was thus not seriously contested or litigated on the record. I thus feel that it would be improper at this for me to attempt an analysis of the 1980 Rules in light of the Board's recent alteration of its earlier standard,[41] or in light of any other authority. I do find, however, that the publication of the 1980 Rules did not extinguish the earlier violations resulting from the 1978 Rules, and as found herein.[42]

E. *The Bulletin Board Provisions of the Union Contract*[43]

On August 22, 1977 the union and the company entered into their collective bargaining agreement. Article XXIII contained 3 sections dealing with the use of some 9 union bulletin boards at the plant. Section 1 restricted use of the bulletin boards to the union "for the posting of official Union notices." One union officer was to be designated as the officer "authorized to post such notices." Section 2 restricted the bulletin boards use to notifying "bargaining unit" employees only of "official Union business", ex-

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[40]*Essex International, Inc., supra.*

[41]*TRW Bearing Division, A Division of TRW, Inc., supra.*

[42]I recognize that the 1980 Rule changes many well have been a good-faith effort on the part of the company to remedy the earlier defects, and it would not be any intention herein to condemn any such efforts on the part of this or any other employer who maybe so motivated. The General Counsel argues in his brief that, for various reasons, the 1980 Rule is also violative of the Act, and urges a finding to that effect in this case. As indicated above, I conclude that to do so would be improper in this case, and I further feel that such a finding is not necessary to preserve the violations attributable to the earlier Rules. By the testimony of union president Safran and industrial relations manager Willhite (himself), I find that the new rules had not been effectively distributed to the employees or sufficiently promulgated to effect a repudation of the old rules.

[43]As indicated earlier, no charge was filed against the union in this case, thus the complaint only alleges the company violated the Act regarding the existance of these provisions.

cluded their use for "organizational activities or Union membership solicitation", and further excluded the posting of "controversial matter" in any notice to be posted. Section 3 prohibited all other postings of notices and "other general distributions" of any kind. On August 29, 1980 a new collective bargaining agreement became effective with 2 sections regarding union bulletin boards.[44] Section 1 remained essentially the same. Section 2 contains no "official Union business" restriction and substitutes "inflammatory matter" for "controversial matter."

The General Counsel argues in his brief that Section 3 of the 1977 contract was the objectionable section in that contract, and I agree, and so find that it was in violation of Section 8(a)(1) of the Act as alleged in the complaint. In contrast I find that Sections 1 and 2 of the 1977 contract, standing alone, were within the legal bounds.[45] Section 3 in the earlier contract served to be more restrictive than the company's Rules which I have earlier found herein to be violative of the Act. The Section prohibited "other general distribution" by all employees except that permitted in Sections 1 and 2.[46] The exclusion of Section 3 from the 1980 contract did not of course abolish its prior existance and effects and, as in the case of the Rules, the record lacks

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[44]The complaint in the case was also not amended to allege any violations as a result of the new contract. Section 3 of the 1977 contract was excluded completely.

[45]See *N.L.R.B. v. Magnavox Company of Tennessee, supra; Ford Motor Company (Rouge Complex)*, 233 NLRB 698, 96 LRRM 1513 (1977); and *General Motors Corporation, Delco Moraine Division*, 237 NLRB 1509, 99 LRRM 1529 (1978). If I had been confronted in this case with the validity of Sections 1 and 2 in the 1980 contract, my conclusions would be the same.

[46]I deem it unimportant to discuss the question of preemption of the Rules by the contract, as testified to by union president Safran. In my opinion, they both, together or separately, served to restrict the rights of the employees.

evidence that the employees were actually informed of the significant deletion, whether in connection with the 1980 Rules changes or not.[47] The same three-year existance of the no-distribution clause (Section 3) in the 1977 contract in violation of Section 8(a)(1) of the Act in my opinion was in no way extinguished by its exclusion in the 1980 contract. In these findings I have taken into consideration the long period of the Seciton's existance, its obvious illegality, and the Board's implicit and prompt requirements for renouncement.

Upon the foregoing findings of fact, and upon the entire record, I hereby made the following:

Conclusions of Law

1. That the Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. By publishing and maintaining an invalid no-distribution rule which prohibited employees from distributing written or printed matter of any description on company premises at any time without the specific authority of management, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By publishing and maintaining an invalid no-solicitation rule which prohibited unauthorized soliciting for any purpose whatsoever on company premises, the Respondent engaged in unfair labor practices in violations of Section 8(a)(1) of the Act.

4. By entering into a labor agreement with the United Steelworkers of America, AFL-CIO, CLC restricting the

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[47] *Allis Chalmers Corporation*, 224 NLRB 1199, 93 LRRM 1476 (1976); *General Thermodynamics, Inc.*, 253 NLRB No. 21, 105 LRRM 1504 (1980).

posting of notices or the distribution of any kind of literature on company property other than the posting of official Union notices on Union-installed and Union-maintained bulletin boards, the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By unlawfully discharging employee Elvis Mitchell Gilt on December 6, 1979 because he earlier expressed an intention to file a workmen's compensation claim, the Respondent violated Section 8(a)(1) of the Act.

6. That except those violations concluded in paragraphs 2 through 5, above, the Respondent has not otherwise violated the Act.

7. That the aforesaid unfair labor practice affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

In order to remedy the unfair labor practices found herein, my recommended Order will require the Respondent to cease and desist from further violations, to post an appropriate Notice to Employees, and to offer unconditional reinstatement to Elvis Mitchell Gilt and make him whole for all wages lost by him as a result of his unlawful discharge, such backpay and interest thereon to be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977)[48].

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[48]See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[49]

The Respondent, Gruman Flexible Corporation, its partners, officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Maintaining or enforcing a broad no-distribution rule prohibiting employees from distributing written or printed matter of any discription on company premises at any time, with or without the specific authority of management, so as to interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

(b) Maintaining or enforceing a broad no-solicitation rule which prohibits the unauthorized solicitation by employees on company premises for any purpose, so as to interfere with, restrain or coerce employees in the exercise of the rights under Section 7 of the Act.

(c) Maintaining, enforcing or renewing any contractual provision with the United Steelworkers of America, AFL-CIO, CLC restricting the posting of notices or the distribution of any kind of literature on company property except the posting of official Union notices on Union-installed and Union-maintained bulletin boards, so as to interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

(d) Discharging, or otherwise discriminating against employees, because they expressed an intention to file a workmen's compensation claim, thereby interfering with, restraining or coercing employees in the exercising of their

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[49]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

rights under Section 7 of the Act.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Elvis Mitchell Gilt immediate, full, and unconditional reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make the said Elvis Mitchell Gilt whole for any loss of pay suffered as a result of his unlawful discharge in the manner set forth in that portion of this Decision entitled "Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Loudonville, Ohio facility copies of the attached notice marked "Appendix."[50] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not

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[50]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. September 25, 1981

/s/ Russell M. King, Jr.
Russell M. King, Jr.
Administrative Law Judge

APPENDIX

Form NLRB 4727

(9-69)

[Seal: National Labor Relations Board]

JD-474-81

[Seal: United States]

NOTICE TO
EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF
THE UNITED STATES GOVERNMENT

WE WILL NOT maintain an invalid no-distribution rule which prohibits employees from distributing written or printed matter of any description on company premises at any time, with or without the specific authority of management.

WE WILL NOT maintain an invalid no-solicitation rule which prohibits unauthorized solicitation for any purpose whatsoever on company premises.

WE WILL NOT enter into any labor agreement with the United Steelworkers of America, AFL-CIO, CLC which restricts the posting of notices or the distribution of any kind of literature on company property other than the posting of official Union notices on Union-installed and Union-maintained belletin boards.

WE WILL NOT discharge, or otherwise discriminate against employees, because they express an intention to file a workmen's compensation claim.

WE WILL NOT offer ELVIS MITCHELL GILT immediate, full, and unconditional reinstatement to his former position or, if such position no longer exists, to a substantially

equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered by reason of our discrimination against him.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights guaranteed them in Section 7 of the National Labor Relations Act.

GRUMAN FLEXIABLE CORPORATION
(Employer)

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, Room 1695, 1240 East North Street, Cleveland, Ohio 44199 Telephone (216) 522-3715.

EXHIBIT 4.

DECISION AND ORDER.

FJZ

261 NLRB No. 18

D—8704

Barberton, OH

United States of America Before the National Labor Relations Board.

Ohio Brass Company and Ricky Hillyer, an Individual. Case 8—CA—13339—1.

Upon a charge duly filed on November 6, 1979, by Ricky Hillyer, an Individual, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, on May 29, 1980, issued and served on the parties a complaint and notice of hearing. In substance, the complaint alleges that Ohio Brass Company, herein called Respondent, interrogated an employee in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, by inquiring about "the employee's protected concerted activities in processing industrial compensation claims." On June 2, 1980, Respondent filed an answer admitting in part, and denying in part, the allegations of complaint, and requesting that the complaint be dismissed.

Thereafter, on various dates in November 1980, the parties entered into a stipulation of facts in which they petitioned the Board to approve the transfer of this proceeding to the Board and waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision. The parties further stipulated that the entire record in this proceeding shall consist of the charge, the complaint and notice of hearing, the answer, and the stipulation of facts with accompanying exhibits. On December 11, 1980, the parties filed the stip-

ulation of facts and a motion to transfer the proceeding with the Board. On February 20, 1981, the Board granted the motion, approved the stipulation, transferred the proceeding to the Board, and advised the parties that they could file briefs with the Board in Washington, D.C. Thereafter, the General Counsel and Respondent filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the basis of the stipulation, the briefs, and the entire record in this proceeding, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Delaware corporation with its principal office located in Mansfield, Ohio, and a facility located in Barberton, Ohio, is engaged in the manufacture of high voltage porcelain insulators. Annually, in the course and conduct of its business, Respondent ships finished products valued in excess of $50,000 to points directly outside the State of Ohio.

The parties stipulated, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Alleged Unfair Labor Practices

A. *The Stipulated Facts*[1]

Respondent's standard application for employment form, which has been in use continuously since June 1, 1979, and which must be, and has been, completed by all applicants

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[1]Respondent's brief to the Board set forth a number of alleged facts which were not included in the parties' original agreed-upon stipulation. On March 17, 1981, the General Counsel filed a motion to strike portions of Respondent's brief which contained alleged facts not included in the stipulation. We grant the General Counsel's motion and consider herein only those facts included in the parties' original stipulation of facts.

for employment at Respondent's Barberton, Ohio, facility, asks, *inter alia*, whether the applicant has ever "filed an industrial claim." The application includes other questions about the applicant's health, safety background, and physical limitations, if any. Specifically, it questions whether the applicant has ever been hurt in an industrial accident, has ever had spinal injuries or complaint of bad back, or has any physical limitations. The application[2] also notes that all employment is dependent upon the applicant's satisfactorily passing a physical examination.

B. *Contentions of the Parties*

The General Counsel contends that Respondent violated Section 8(a)(1) of the Act by asking its applicants for employment, on Respondent's standard application form, whether they have filed prior industrial, i.e., workers' compensation, claims. The General Counsel argues that such an inquiry, unless justified by a legitimate and substantial business necessity, violates Section 8(a)(1) of the Act because it asks about an applicant's past involvement in protected concerted activity. In support of his position, the General Counsel relies, *inter alia*, on *Boatel Alaska, Inc.*, 236 NLRB 1458 (1978), and *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979). Admitting that an employer has a legitimate and substantial business interest in the health and physical capabilities of his employees, as well as an interest in avoiding hiring employees who present a potential for industrial risk, the General Counsel nevertheless contends that the questions on Respondent's application which directly relate to an applicant's physical condition, coupled with the required physical examination, supply Respondent with the necessary information concerning such matters. Accord-

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[2]The relevant portion of the application is attached to this Decision as an appendix.

ingly, there is no necessity to ask whether an applicant has filed an industrial claim. Respondent, on the other hand, contends that by asking applicants for employment whether they have filed an industrial claim it is seeking information that is relevant to the safe and efficient operation of its business. Respondent further contends that asking whether an applicant has ever filed an industrial claim does not interfere with employees' ability to engage in protected concerted activities. In support of its position, Respondent relies, *inter alia*, on *Buck Kreihs Company, Inc.*, 227 NLRB 352 (1976), and *Daniel Construction Company, a Division of Daniel International Corporation*, 240 NLRB 1254 (1979). Finally, Respondent contends that, even if the Board decides that Respondent's employment application form is unlawful, Respondent should not be found guilty of an unfair labor practice in this proceeding because it was allegedly acting in compliance with existing law when it formulated and used its employment aplication form. In essence, Respondent argues that any decision finding a violation here should be applied prospectively only.

C. *Discussion*

It is well settled that it is unlawful for an employer to inquire into employees' past exercise of protected concerted activity unless the employer has a substantial and legitimate business justification for doing so.[3] It is also well settled that applicants for employment enjoy the protection of Section 7 of the Act.[4] In *Krispy Kreme Doughnut, supra*, the Board found that the filing of a workers' compensation claim by an individual employee constituted protected concerted

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[3]*Rochester Cadet Cleaners, Inc.*, 205 NLRB 773 (1973); *Boatel Alaska, supra*.

[4]*Lucy Ellen Candy Division of F & F Industries, Inc.*, 204 NLRB 121, 123 (1973).

activity and that the discharge of an employee because of his expressed intent to file such a claim was unlawful. We now must determine whether it was unlawful for Respondent simply to inquire of an applicant on its employment application form whether the applicant had previously filed an industrial or workers' compensation claim. For the following reasons, we find no violation of the Act in such inquiry.

Unlike employer inquiries into an employee applicant's prior union experiences or affiliations, for which there is no legitimate business justification, Respondent, in the instant case, has a legitimate and substantial business justification for its inquiry, i.e., the health and safety of its work force. Its knowledge that an applicant has filed a prior industrial claim may alert Respondent to the fact that the employee applicant may once have been injured on the job, raising the possibilities of a continuing injury. At the least, the information may be of aid to the physician conducting the entry physical, and the information is relevant to the decision to hire an applicant.[5] Thus, Respondent is entitled to be aware of any possible physical limitations of prospective employees to determine whether it is advisable to hire them, and, if they are hired, to avoid placing them in situations potentially dangerous to themselves and their fellow workers. Inquiring into an applicant's past history of industrial claims does not, as the General Counsel would intimate, *per se*, interfere with the applicant's ability to engage in protected concerted activity. We see no "inherently coercive" effect on such protected activity where, as here, and unlike those cases where inquiry is made of an applicant's prior union activity, Respondent has a legitimate reason for such inquiry. Moreover, there is no evidence in the instant case that Respondent has ever refused to hire

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[5]Cf. *Daniel Construction, supra*; Buck Kreihs, supra.

any applicant simply because of that applicant's prior filing of industrial or workers' compensation claims.

As noted, in *Krispy Kreme, supra,* the Board found that an employer had violated the Act when it *discharged* an employee solely because of his expressed intent to file a workmen's compensation claim. The Board found that the employee's "refusal to forebear from filing a claim opposes [the employer's] attempt to deny him and other employees access to workmen's compensation benefits," which were benefits that arose out of the employment relationship and which were of common interest to employees.[6]

Here we find no attempt by Respondent to "deny employees access to workmen's compensation benefits" by its *simple* inquiry into whether an applicant had ever filed for such benefits. We also note that the Administrative Law Judge in *Krispy Kreme* indicated that the discharge of the employee there "because he manifested an intention to file a workmen's compensation claim, if condoned, would recognize a right in employers to create a coercive aura with respect to this remedial procedure and thereby to dampen the salutary impact of workmen's compensation laws on job safety generally."[7] Such a "coercive aura" is not involved in a case, like the instant case, where the conduct complained of is the mere inquiry about the filing of a claim in the past, and where the General Counsel has shown no untoward motive on Respondent's part for such an inquiry.[8]

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[6]245 NLRB at 1053.

[7]245 NLRB at 1062

[8]In *Krispy Kreme* the Board found the employee's activity protected because the matter of workers' compensation benefits arose out of the employment relationship and was of common interest to other employees. Accordingly, the discharge (for expressed intent to file a workers' compensation claim) denied access to compensation to an individual employee and, by example, to other employees. Here, we are faced with a situation where an inquiry is made into an applicant's prior filing

In such circumstances, we find no violation in Respondent's asking such a question on its application form, since we deem it a pertinent question "bearing upon the applicant's history of personal injury,"[9] and one which we find Respondent was privileged to ask.[10]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. April 13, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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of industrial claims. While applicants for employment are entitled to the protections of the Act and we have held that it is *per se* unlawful for an employer to inquire of an applicant's prior union activities, other inquiries may be lawful if supported by a substantial and legitimate business justification. Here, we have determined that Respondent has a substantial and legitimate business justification for its inquiry, i.e., the health and safety of its work force. Further, here, unlike *Krispy Kreme*, there is no showing that any applicant or employee has been directly or "by example" denied access to compensation by the employer's inquiry because no evidence has been presented to show that Respondent has ever refused to hire any applicant who had previously filed an industrial claim.

[9] *Daniel Construction, supra*, 240 NLRB at 1258.

[10] *Daniel Construction Company, supra; Buck Kreihs, supra*; cf. *Krispy Kreme, supra* at 1057—60.

Because we find that Respondent did not violate the Act by inquiring of applicants for employment if they had filed industrial claims, we find it unnecessary to reach Respondent's other contention that any decision finding a violation should be applied prospectively only.

MEMBER ZIMMERMAN, concurring:

I agree that Respondent's inquiry on a standard application form as to whether the job applicant had ever "filed an industrial claim" — the only issue in this case — is not a violation of the Act. Unlike my colleagues, however, I would find it unnecessary to examine Respondent's justification for the inquiry.

They assert that no employer inquiry concerning past exercise of protected activity is lawful unless the employer has a substantial and legitimate business justification for doing so. Requiring such justification is, of course, valid with respect to union activity, which is expressely protected by Section 7 of the Act. Filing workers' compensation claims, however, should be distinguished as an *implied* Section 7 right. Such claims do arise out of the employment relationship, and are presumed to be of common interest to other employees, absent evidence of disavowal of concern by employees.[11] The filing of such claims is thus protected by the Act only through a rebuttable presumption that the activity is concerted, and, unlike union activity, it is not covered *per se* by the Act. Accordingly, the mere inquiry into the filing of past claims cannot be found unlawful in the absence of evidence of unlawful motive. No such unlawful purpose is involved here, and I therefore join in dismissing the complaint.

Dated, Washington, D.C. April 13, 1982

Don A. Zimmerman, Member
NATIONAL LABOR RELATIONS BOARD

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[11] *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975); *Self Cycle & Marine Distributor Co., Inc.*, 237 NLRB 75 (1978); *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), enforcement denied 635 F.2d 304 (4th Cir. 1980).

APPENDIX.

APPLICATION FOR EMPLOYMENT THE OHIO BRASS COMPANY.

D — 8704

Application for employment form not filled out.

PROOF OF SERVICE BY MAIL

I, Corine Assouline, declare that I am a citizen of the United States and am employed in the City and County of San Francisco, California. I am over the age of eighteen years and am not a party to the within action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108.

On January 28, 1983, I served the within SUPPLEMENTAL EXHIBITS TO PETITION FOR HEARING on the parties involved by placing a true copy thereof in a sealed envelope with postage thereon prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

Alfred Lombardo, Esq.
Rucka, O'Boyle & Lombardo
245 West Laurel Drive
Salinas, California 93906

Honorable William R. Butler
Worker's Compensation Appeals Board
21 West Laurel Drive, Suite 69
Salinas, California 93901

Worker's Compensation Appeals Board
Reconsideration Department
455 Golden Gate Avenue
San Francisco, California 94102

Mission Insurance Company
Post Office Box 5219
San Jose, California 95150

State Compensation Insurance Fund
Post Office Box 759
San Jose, California 95106

Hartford Accident and Indemnity Company
Post Office Box 5086

San Jose, California 95150

Clifford C. Porter, Clerk
Court of Appeals, First Appellate District
State Building, Room 4154
455 Golden Gate Avenue
San Francisco, California 94102

I, Corine Assouline, certify under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of January, 1983, at San Francisco, California.

/s/ Corine Assouline
CORINE ASSOULINE

APPENDIX II.

Order Denying Hearing [by California Supreme Court] (February 9, 1983).

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

February 9, 1983.

I have this day filed Order HEARING DENIED.

AO 20025

In re: (1 Civ. No. 53500) AVINA vs. W.C.A.B. (Dalgety Foods)

Respectfully,
Clerk

APPENDIX JJ.

Notice of Appeal [showing filing on April 27, 1983 in California Workers' Compensation Appeals Board].

No. 82-

In the Supreme Court of the United States, October Term, 1982.

Dalgety Foods, Inc., Appellant, vs. Angelina Avina, Appellee.

Filed: April 27, 1983.

On Appeal from a Judgment of the Court of Appeal of the State of California in Case No. A020025 (California Workers' Compensation Appeals Board Case Nos. 76 SAL 8071 and 77 SAL 9360).

NOTICE OF APPEAL.

Appellant Dalgety Foods, Inc. ("Dalgety") hereby gives notice of its appeal to the Supreme Court of the United States from the judgment of the First Appellate District of the Court of Appeal of the State of California, in Case No. A020025 (WCAB Case Nos. 76 SAL 8071 and 77 SAL 9360), denying Dalgety's petition for writ of review and request for stay, which judgment was entered on January 10, 1983 and as to which the Supreme Court of the State of California denied a hearing on February 9, 1983.

This appeal is taken under 28 U.S.C. Section 1257(2) and 28 U.S.C. Section 2101(c).

All parties required to be served with this notice have been served, as is more fully set forth in the attached proof of service.

DATED: April 26, 1983.

GEORGE J. TICHY, II, ESQ.
MICHAEL B. MARGOLIS, ESQ.
Counsel of Record

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
BY: /s/ Michael B. Margolis
MICHAEL B. MARGOLIS
Attorneys for Appellant

PROOF OF SERVICE BY MAIL

I, Maria Sorrentino, declare that I am a citizen of the United States and am employed in the City and County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action. My business address is 1925 Century Park East, Suite 850, Los Angeles, California 90067.

On April 26, 1983, I served the within
NOTICE OF APPEAL

on the parties involved by placing a true copy thereof in a sealed envelope with postage thereon prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

California Workers' Compensation
Appeals Board
21 West Laurel Drive, Suite 69
Salinas, California 93901

Alfred Lombardo, Esq.
Rucka, O'Boyle & Lombardo
245 West Laurel Drive
Salinas, California 93906

Mission Insurance Company
Post Office Box 5219
San Jose, California 95150

State Compensation Insurance Fund
Post Office Box 759
San Jose, California 95106

Hartford Accident and Indemnity Company
Post Office Box 5086
San Jose, California 95150

I, Maria Sorrentino, declare under penalty of perjury that the foregoing is true and correct, and that this document was exeucted on the 26th day of April, 1983, at Los Angeles, California.

/s/ Maria Sorrentino
MARIA SORRENTINO

APPENDIX KK.

Notice of Appeal [showing filing on April 27, 1983 in California Court of Appeal].

No. 82-

In the Supreme Court of the United States, October Term, 1982.

Dalgety Foods, Inc., Appellant, vs. Angelina Avina, Appellee.

Filed: April 27, 1983.

On Appeal from a Judgment of the Court of Appeal of the State of California in Case No. A020025 (California Workers' Compensation Appeals Board Case Nos. 76 SAL 8071 and 77 SAL 9360)

NOTICE OF APPEAL

Appellant Dalgety Foods, Inc. (''Dalgety'') hereby gives notice of its appeal to the Supreme Court of the United States from the judgment of the First Appellate District of the Court of Appeal of the State of California, in Case No. A020025 (WCAB Case Nos. 76 SAL 8071 and 77 SAL 9360), denying Dalgety's petition for writ of review and request for stay, which judgment was entered on January 10, 1983 and as to which the Supreme Court of the State of California denied a hearing on February 9, 1983.

This appeal is taken under 28 U.S.C. Section 1257(2) and 28 U.S.C. Section 2101(c).

All parties required to be served with this notice have been served, as is more fully set forth in the attached proof of service.

DATED: April 26, 1983.

GEORGE J. TICHY, II, ESQ.
MICHAEL B. MARGOLIS, ESQ.
Counsel of Record

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
BY: /s/ Michael B. Margolis
MICHAEL B. MARGOLIS
Attorneys for Appellant

PROOF OF SERVICE BY MAIL

I, Maria Sorrentino, declare that I am a citizen of the United States and am employed in the City and County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action. My business address is 1925 Century Park East, Suite 850, Los Angeles, California 90067.

On April 26, 1983, I served the within
NOTICE OF APPEAL

on the parties involved by placing a true copy thereof in a sealed envelope with postage thereon prepaid, in the United State Post Office mail box at Los Angeles, California, addressed as follows:

California Workers' Compensation
Appeals Board
21 West Laurel Drive, Suite 69
Salinas, California 93901

Alfred Lombardo, Esq.
Rucka, O'Boyle & Lombardo
245 West Laurel Drive
Salinas, California 93906

Mission Insurance Company
Post Office Box 5219
San Jose, California 95150

State Compensation Insurance Fund
Post Office Box 759
San Jose, California 95106

Hartford Accident and Indemnity Company
Post Office Box 5086
San Jose, California 95150

I, Maria Sorrentino, declare under penalty of perjury that the foregoing is true and correct, and that this document was executed on the 26th day of April, 1983, at Los Angeles, California.

/s/ Maria Sorrentino
MARIA SORRENTINO

APPENDIX LL.

Order Extending Time to Docket Appeal [by Honorable Justice William H. Rehnquist] (April 29, 1983).

Supreme Court of the United States, No. A-880.

Dalgety Foods, Inc., Appellant, v. Angelina Avina.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including June 23, 1983.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 29th
day of April, 1983

APPENDIX MM.

Petition for Hearing [by Angelina Avina] (December 2, 1981).

In the Supreme Court of the State of California.

Angelina Avina, Petitioner, vs. Workers' Compensation Appeals Board of the State of California; Spiegle Foods; Mission Insurance Company; State Compensation Insurance Fund; and Hartford Accident and Indemnity Company, Respondents. Civil No.: 53500. WCAB No.: 76 SAL 8071, 77 SAL 9360.

To The Honorable Chief Justice Rose Bird and Associate Justices of the Supreme Court:

Angelina Avina petitions for a hearing in the Supreme Court from the order of the Court of Appeals, First Appellate District, Division Two, dated November 27, 1981, denying without opinion her petition for writ of review of the decision of responding Workers' Compensation Appeals Board in that certain proceeding entitled "Angelina Avina v. Spiegle Foods, Mission Insurance Company, State Compensation Insurance Fund, and Hartford Accident and Indemnity, No. 76 SAL 8071 and 77 Sal 9360." The decision of the Appeals Board rendered on reconsideration reversed the decision of the trial judge and erroneously denies your petitioner Labor Code §132(a) remedies as against the respondent employer. A copy of the order of the Court of Appeal is attached hereto as exhibit "A".

Petitioner asserts that a hearing is necessary to secure uniformity of decision, to settle important questions of law and to accomplish substantial justice under the provisions of the workers' compensation law. The scope of Labor Code §132(a)'s protection, and of the defenses thereto, is at issue.

I. *QUESTIONS PRESENTED*

(1) Has an employer violated §132(a) of the California Labor Code when it discharges an employee following an investigation into that employee's medical history if the investigation was prompted by the employee's receipt of a $22,000.00 settlement in a workers' compensation action against the employer and prompted by concern over future potential liability?

(2) Is an employer's good faith but mistaken belief that an employee's continued employment would be a danger to the work place sufficient grounds to remove the employer from the reach of California Labor Code §132(a)?

(3) Should the Court accept the contention of an employer that it had concluded in good faith that an employee's injury had rendered her a danger to the work place even though that employee, after the injury, had returned to the job, performed to the employer's satisfaction, and had been released to do such work by the treating physician?

II. *SUMMARY OF FACTS*

Petitioner, was originally hired in 1968 by Spiegle Foods, Inc., the predecessor in interest to Dalgety Foods, Inc. (hereafter "employer"). She continued to work seasonally at Dalgety as a conveyor belt worker and produce sorter for eleven years. Commencing in 1973, she suffered a series of industrial and nonindustrial injuries ranging from knife cuts common in such occupations to more severe injuries to her wrist and knee. The knee injury, occuring in 1976, prompted her to file a workers' compensation claim. This action ended with a Compromise and Release payment from respondent Mission Insurance Company to petitioner of $22,628.80 on July 6, 1979. Shortly thereafter, petitioner was injured as the result of a nonindustrial fall. She was unable to work until September 7, 1979 on which date she

reported for work. At that time she presented to the employer a medical release, signed by her physician, which authorized her to return to her former work. The employer nevertheless refused to put her to work and, on September 12, notified her in writing that her employment was terminated. Petitioner then sought, and eventually found, similar employment with another company while simultaneously initiating a grievance procedure against Dalgety. During the arbitration hearing which culminated that procedure, petitioner alleged that she had not been discharged "for cause", the only basis for discharge recognized as legitimate in the collective bargaining agreement between the Teamster's union and Dalgety. Dalgety maintained that it had discharged petitioner because her injuries had disabled her to such an extent that her continued employment would endanger both plaintiff herself and those co-workers who would depend upon her performance. The arbitrator ruled in favor of Dalgety.

Petitioner also filed a claim with the respondent Workers' Compensation Appeals Board (hereafter "WCAB"), alleging that her discharge was a response by Dalgety to her workers' compensation settlement and that it therefore was discriminatory and in violation of Labor Code §132(a). In support of this allegation, petitioner submitted evidence that (1) the process by which Dalgety eventually discharged her was initiated as a reaction to the size of the Compromise and Release settlement which which she received; (2) Dalgety did not investigate the effect petitioner's injuries had on her job performance in reaching its decision to discharge her; and (3) Dalgety discounted completely the medical release presented by petitioner, choosing instead to rely on the independent medical assessment made by a nonmedical employee. In response, Dalgety contended that it had engaged in a thorough investigation of petitioner's disability

and had reasonably concluded that she was incapable of meeting the demands of her assigned job. Dalgety argued that its decision to discharge plaintiff was supported by medical evidence and that, even if its belief regarding petitioner's incapacity to work proved to be mistaken, it was nevertheless sincere and that such a good faith mistaken belief immunized Dalgety from any charge that it had dismissed petitioner in violation of Labor Code §132(a). The WCAB Judge ruled that petitioner's return to work following her injury, her satisfactory performance during that time, and the medical release issued by the treating physician combined to indicate that petitioner's disability was not so severe as to warrant her discharge. The Judge accepted Dalgety's belief to the contrary as genuine but ruled that such a mistaken belief, unsupported by the weight ov available evidence, did not excuse Dalgety's otherwise discriminatory discharge of petitioner.

Dalgety appealed the WCAB Judge's ruling to a three-member panel of respondent Board. The majority ruled that a discriminatory motive on the part of Dalgety was prerequisite to a finding that its discharge of petitioner was discriminatory. The majority concluded that (1) petitioner's demonstration that her continued employment would not be dangerous merely created an initial presumption that Dalgety's motive in discharging her was discriminatory and (2) Dalgety's evidence of a good faith belief that injury would result from plaintiff's continued employment was suffcient to rebutt that presumption. Petitioner's request for reconsideration was denied by the same panel. In the accompanying opinion, the dissenting Commissioner outlined her belief that Labor Code §132(a) prohibits all discriminatory action by an employee against an injured employee, including discrimination resulting from an employer's mistaken judgment.

III. *ARGUMENT AND AUTHORITIES*

A) DALGETY'S INVESTIGATION OF PETITIONER'S MEDICAL HISTORY WAS A RESPONSE TO HER WORKERS' COMPENSATION SETTLEMENT AND WAS THEREFORE IN VIOLATION OF CALIFORNIA LABOR CODE §132(a).

In *Judson Steel Corp. vs. WCAB*, 22 C.3d 658 (1978), this Court declared that Labor Code §132(a) prohibits *all* employer discrimination against an employee based upon the employee's pursuit of a workers' compensation claim against the employer. In the present case, Dalgety freely admits that it singled out petitioner for review solely in response to the size of the settlement involved in her workers' compensation case. Petitioner submits that both Dalgety's investigation and all derivative events, including her dismissal, were therefore in violation of Labor Code §132(a).

B) SHOULD THE COURT DECIDE THAT DALGETY'S INVESTIGATION OF PETITIONER'S MEDICAL RECORD DID NOT VIOLATE §132(a), IT IS NEVERTHELESS TRUE THAT THE INVESTIGATION DID NOT REVEAL THAT PETITIONER'S DISABILITY WAS SO SEVERE AS TO RENDER HER A DANGER TO THE WORK PLACE.

After the WCAB hearing, the trier of fact found that as of the time of her dismissal petitioner was capable of returning to her previous work with Dalgety. The WCAB Judge based his findings on (1) the medical reports of Dr. Storey, petitioner's treating physician, and (2) the fact that petitioner did in fact return to similar work, both at Dalgety and elsewhere, following her industrial injury. The medical reports of Dr. Storey reflected petitioner's recuperation in that he stated in an August 8, 1979, letter to Dalgety that petitioner could not perform certain aspects of her job but

later changed his assessment and released her to work without restrictions in early September 1979. The Judge reasonably concluded that the more recent report put Dalgety on notice that petitioner's previous medical problems had receded to a point where she was then able to return to work. He therefore held that the early reports did not justify Dalgety's refusal to accept the medical release. The Judge's factual holding that petitioner was capable of returning to work was uncontroverted by the WCAB panel which reviewed the Judge's decision and is not subject to review here absent a finding on the part of this Court that the holding was not supported by substantial evidence. [Labor Code §5952] Petitioner respectfully submits that there was no basis for reversal of the WCAB Judge's decision on this point.

C) SINCE THE EVIDENCE AVAILABLE TO DALGETY THROUGH ITS INVESTIGATION INDICATED THAT PETITIONER, ALTHOUGH PARTIALLY DISABLED, WAS CAPABLE OF PERFORMING HER ASSIGNED WORK, DALGETY'S SUBSEQUENT DISMISSAL OF PETITIONER SHOULD BE PRESUMED TO BE IN VIOLATION OF LABOR CODE §132(a).

Judson Steel, supra, held that Labor Code §3202 is mandate that workers' compensation laws be liberally construed by Courts of this state applies equally to the anti-discrimination provisions of Labor Code §132(a). In *Western Electric Co. vs. WCAB, (Smith)*, 99 CA3d 629, (1979), the Court developed a test for §132(a) violations in keeping with a liberal construction of that statute. The test is summarized in *Western Electric* as follows:

> ". . . If [the discharged employee] can demonstrate she could have returned to work and performed her job

> without risk of re-injury or further injury to herself, then the Board could properly draw an inference of prohibited discriminatory action by [the employer] unless [the employer] can otherwise demonstrate to the contrary."

As discussed above, the WCAB Judge decided that petitioner had demonstrated that she was able to return to work without risk of injury. Under *Western Electric*, therefore, he presumed that petitioner's dismissal was discriminatory and assigned to Dalgety the burden of demonstrating otherwise.

D) DALGETY HAS FAILED TO REBUTT THE PRESUMPTION THAT ITS DISMISSAL OF PETITIONER WAS DISCRIMINATORY.

Dalgety contended a trial that its investigation of petitioner's medical record led to a belief, on the part of the relevant decision makers, that petitioner could not perform her previous job without risk of injury to herself or others. That belief, as the WCAB Judge found, proved to be mistaken. However, Dalgety consistently maintained that those decision makers held this belief "in good faith" and that such a good faith but mistaken belief was sufficient to rebutt the presumption that its dismissal of petitioner was discriminatory. More generally, Dalgety maintained that no dismissal of an employee could be found discriminatory as long as the employer could demonstrate that its *motive* in making the dismissal was not discriminatory. As detailed above, Labor Code §132(a) prohibits *all* discrimination against an employee grounded in a workers' compensation claim. Even were the Code not to be construed liberally, there is no room in the statutory language to carve out an exception to the effect that a dismissal is not discriminatory unless the employer acted out of revenge or in retaliation.

Dalgety cited the test of *Western Electric*, supra, as authority for its position. Petitioner argued that Dalgety had misinterpreted the language of the *Western Electric* Court. Thus, the case at trial, and on reconsideration, hinged on the interpretation of a single passage from the *Western Electric* opinion. The disputed language is as follows:

> "[The employer] asserts it discharged [the employee] as there was no work available which she could perform without the risk of either re-injury or further injury. If this is the true reason [the employer] refused to allow [the employee] to return to work, then there was no §132(a) violation. '§132(a) does not compel an employer to ignore the realities of doing business by "re-employing" unqualified employees or employees for whom positions are no longer available.' (*Judson Steel* supra, at Page 677 as cited in *Western*, supra, at Page 644 and 645)."

Dalgety read into the phrase ". . .true reason. . ." the meaning "genuine belief" and its defense became an elaborate effort to demonstrate the genuiness of its belief that petitioner's continued employment would be dangerous to everyone in the work place. Petitioner, on the other hand, argued that Dalgety's sincerity was not at issue because the phrase ". . .true reason. . ." referred not to the employer's subjective beliefs but to an opportunity an employer was given by the Court to demonstrate that *objective* conditions were such that it had no choice but to dismiss the aggrieved employee. In support of this position, petitioner points out that the *Western Electric* Court, in the very next line of the opinion, quotes *Judson Steel*, supra, in giving examples of the kind of "true reasons" for which an employer can legitimately consider not re-hiring an injured worker. The reasons cited there are: (1) that the employee has become disqualified for the position by reason of the injury, or (2)

that the employee's position has been filled in her absence and no other positions are available. Dalgety has made no contention that any such objective condition exists in this case. Petitioner submits that, had this Court meant to recognize as legitimate a reason so radically different from those objective tests set forth in *Judson Steel* it would have done so explicitly.

Aside from the language of *Western Electric*, petitioner urges that the Court consider the repercussions of adopting subjective sincerity on the part of an employer as the standard for justifying the dismissal of an industrially injured employee. Suppose an employer genuinely believed that any employee who brought a workers' compensation action was thereafter a danger to the work place and the employer therefore routinely discharged all such employees. Statistically speaking, such a belief might even be reasonable. Adoption of Dalgety's theory would remove such employer discrimination from the reach of Labor Code §132(a). Section 132(a) would therefore be rendered useless as an enforcer of worker rights.

E) EVEN SHOULD THE COURT ACCEPT THE PROPOSITION THAT A GOOD FAITH BUT MISTAKEN BELIEF ON DALGETY'S PART THAT PETITIONER WAS A DANGER TO THE WORK PLACE IS A DEFENSE TO A LABOR CODE §132(a) ACTION, SUCH A BELIEF SHOULD AT LEAST BE REQUIRED TO BE REASONABLE AND DALGETY'S BELIEF IS UNFOUNDED.

Even the most maliciously discriminating employer could allege a good faith belief that a recovered employee was somehow unfit for employment. Therefore should the Court decide to recognize a good faith but mistaken belief as a defense to a §132(a) action, it would seem prudent to re-

quire, at the very least, that the belief be reasonable. Petitioner contends that Dalgety's belief was unreasonable given the evidence available, as detailed above, during its investigation of her medical record. The decision makers at Dalgety, however, ignored some of this evidence and never made a reasonable effort to discover certain other pieces of evidence. Examples of the inadequacy of the investigator's performance are many: They never check petitioner's production record or discussed her performance with her immediate supervisor; [deposition of corporate director of industrial relations] they cancelled the medical examination of petitioner by a company doctor, ostensively because they intended to rely on Dr. Storey's opinion, and then rejected the release issued by Dr. Storey [deposition of corporate safety manager]; they never sought to discover whether work was available at Dalgety for an individual in petitioner's position, as they interpreted that position [deposition of plant personnel manager]. Petitioner therefore submits (1) that no conclusion adverse to petitioner reached by Dalgety as a result of such an inadequate investigation could be deemed reasonable and (2) that a good faith but unreasonable and mistaken belief that petitioner was a danger to the work place should not be recognized as a valid defense to the §132(a) action.

CONCLUSION

Why has the employer in this case spent so much money to keep an unskilled seasonal cannery worker from returning to her job?

If the employer's "mistaken belief" was indeed honest, why hasn't it reinstated or offered Mrs. Avina her job back?

There was a final finding of fact in this case that Mrs. Avina is able to perform her job. Won't allowing her discharge to stand because of an "honest mistake" by the

employer despite that fact subjugate all of this employer's employees and place them in fear of filing a workers' compensation claim lest they also become the remediless victims of an "honest mistake"?

Doesn't it make more sense to place the burden of the mistake on the party responsible for the mistake rather than on the innocent employee who is least able to afford it? As the employer has so condescendingly acknowledged in all of its briefs, no job means no paycheck. Would there even be a burden placed on the employer in requiring it to reinstate an employee capable of performing the job?

If Labor Code §132(a) is viewed simply as a penalty or punitive provision to punish retaliatory employers, then from a policy standpoint it would make sense to not invoke it against an employer whose mistaken discharge of an employee was "honest" or "genuine" or "in good faith." But if the policy of §132(a) is to protect the injured worker of this state, the motive should be immaterial and simply the fact that a mistake was made should be sufficient to invoke the statute's protection.

Petitioner prays that this Court will grant a hearing and protect the industrially imjured of this state from what is obviously an unfair and unjust result.

Dated: December 2, 1981

RUCKA, O'BOYLE & LOMBARDO
By: /s/ Alfred Lombardo
ALFRED LOMBARDO
Attorney for Petitioner

APPENDIX NN.

Petition for Rehearing [by Dalgety Foods, Inc.] (December 29, 1981).

In the Supreme Court of the State of California.

Court of Appeal No. 1 Civil 53500.

Dalgety Foods, Inc., Petitioner, vs. Angelina Avina, Respondent.

To the Honorable Rose Elizabeth Bird, Chief Judge, and to the Associate Judges of the Supreme Court of the State of California:

I

INTRODUCTION

Pursuant to California Rule of Court 27, Dalgety Foods, Inc. (''Petitioner'') hereby petitions this Court for a rehearing to consider this Court's decision of December 23, 1981 in the above-captioned matter (''December 23 Decision'').

II

PROCEDURAL HISTORY

The December 23 Decision granted the Petition for Hearing filed by Angelina Avina, the Respondent herein (''Respondent''), wherein Respondent sought review of the decision filed in the Court of Appeal of the State of California, First Appellate District, Division Two, on November 27, 1981 in Case No. 1 Civil 53500 (''Court of Appeal Decision''). That Court of Appeal Decision denied Respondent's petition for writ of review of a decision of the Workers' Compensation Appeals Board of the State of California which had denied Respondent relief on her claim under Labor Code Section 132a (''WCAB Decision''). The De-

cember 23 Decision of this Court also directed the Court of Appeal to review the WCAB Decision.[1]

III

GROUNDS FOR REHEARING

Rehearing is appropriate because the Petitioner herein was precluded from responding to the Respondent's Petition for Hearing, as Petitioner was entitled to do under California Rule of Court 28, by Respondent's failure to provide Petitioner with a copy of said Petition for Hearing. As a result, Petitioner was denied procedural due process by the December 23 Decision.

The relevant facts are as follows:

(1) On December 18, 1981, Petitioner's counsel, Michael B. Margolis, happened to telephone Judge Butler of the Salinas office of the Workers' Compensation Appeals Board regarding a matter not relevant here. In that conversation, Judge Butler happened to make reference to the instant case and indicated that he believed a Petition for Hearing had been filed in this Court by Respondent. That was the first indication Mr. Margolis had that such a petition had been filed.

(2) That same day, Mr. Margolis telephoned Respondent's attorney for confirmation. Mr. Al Lombardo, of Rucka, O'Boyle and Lombardo, told Mr. Margolis that Respondent had filed a Petition for Hearing in this Court

---

[1]Petitioner has not yet received a copy of this Court's December 23 Decision, but the Clerk of this Court advised Petitioner's counsel of its content by telephone on December 28, 1981.

on December 2, 1981. Mr. Margolis advised Mr. Lombardo that he had not received a copy of that Petition for Hearing and requested that Mr. Lombardo send a copy immediately by Express Mail to assure prompt delivery.

(3) That same day, December 18, 1981, Mr. Margolis sent a letter by Express Mail to the Clerk of this Court setting forth the facts detailed in Paragraphs (1) and (2) above and requesting, pursuant to California Rule of Court 28(a), that the Court extend the time in which it would rule on Respondent's Petition for Hearing to allow Petitioner time to receive, review, and respond to said Petition for Hearing. A copy of that letter is attached hereto as Exhibit "A".

(4) Immediately upon Mr. Margolis's return from the holidays, on December 28, he called Mr. Lombardo's office to advise that he had not yet been provided with a coy of the Petition for Hearing. Because he was told that Mr. Lombardo was out of the office, Mr. Margolis left a message that no copy had yet been received.

(5) Also on December 28, Mr. Margolis called the Clerk of this Court to ascertain the status of the Petition for Hearing. He was informed that, on December 23, 1981, this Court had granted Respondent's Petition for Hearing and directed the Court of Appeal to review the WCAB Decision.

(6) As of the date of this Petition, Petitioner still has not received a copy of Respondent's Petition for Hearing.

IV

RELIEF REQUESTED

For the foregoing reasons, Petitioner requests that this Court grant this petition for rehearing, vacate its December 23 Decision, dismiss Respondent's Petition for Hearing, and grant Petitioner such other relief as it deems appropriate.

DATED: December 29, 1981.

Respectfully submitted,

GEORGE J. TICHY, ESQ.
MICHAEL B. MARGOLIS, ESQ.
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation

By /s/ Michael B. Margolis
MICHAEL B. MARGOLIS
Attorneys for Petitioner
DALGETY FOODS, INC.

EXHIBIT "A".

[Letterhead: Littler, Mendelson, Fastiff & Tichy]

December 18, 1981

EXPRESS MAIL

Laurence B. Gill, Clerk
California Supreme Court
Room 4250 State Building
San Francisco, California 94102

Re: Angelina Avina v. Workers' Compensation Appeals Board, WCAB Case Nos. 76 SAL 8071 and 77 SAL 9360

Dear Mr. Gill:

Quite by accident, I learned today from Judge Butler of the Workers' Compensation Appeals Board that the Petitioner in the above-referenced matter has appealed the Court of Appeal's denial of her Petition for Writ of Review. I contacted the attorney for the Petitioner, Al Lombardo of Rucka, O'Boyle & Lombardo in Salinas, California, for confirmation. He advised me that a Petition had been filed with the Supreme Court on December 2. I informed him that I have received no copy of that Petition and requested that he send me a copy today by Express Mail. He agreed to do so.

In the interim, I am concerned lest the Court make a decision on the Petitioner's appeal before I have had a chance to review the Petition and prepare a response. Accordingly, I hereby request that the Court extend the time in which it may rule on the Petition, pursuant to California Rule of Court 28(a), to allow adequate time for the preparation of

a response to the Petition and consideration of that response by the Court. Mr. Lombardo has informed me that he does not object to my request.

Thank you for your kind attention to this matter.

Sincerely,

/s/ Michael B. Margolis
MICHAEL B. MARGOLIS

MBM:ms
cc: Al Lombardo

PROOF OF SERVICE BY MAIL

I, VICKIE YATES, declare that I am a citizen of the United States and am employed in the City and County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action. My business address is 2049 Century Park East, Suite 1660, Los Angeles, California 90067.

On December 29, 1981, I served the within PETITION FOR REHEARING on the parties involved by placing a true copy thereof in a sealed envelope with postage thereon prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Alfred Lombardo, Esq.
Rucka, O'Boyle & Lombardo
245 West Laurel Drive
Salinas, California 93906

Court of Appeal
First Appellate District
Division Two
4154 State Building
Civic Center
San Francisco, California 94101

Honorable William R. Butler
Workers' Compensation Appeals Board
21 West Laurel Drive, Suite 69
Salinas, California 93901

Workers' Compensation Appeals Board
Reconsideration Department
455 Golden Gate Avenue
San Francisco, California 94102

Mission Insurance Company
P. O. Box 5219
San Jose, California 95150

State Compensation Insurance Fund
P. O. Box 759
San Jose, California 95106

Hartford Accident and Indemnity Company
P. O. Box 5086
San Jose, California 95150

I, VICKIE YATES, certify under penalty of perjury that the foregoing is true and correct, and that this document was executed on the 29th day of December, 1981, at Los Angeles, California.

/s/ Vickie Yates
VICKIE YATES

APPENDIX OO.

Response to Petition for Rehearing [by Angelina Avina] (January 6, 1982).

In the Supreme Court of the State of California.

Court of Appeal No. 1 Civil 53500.

Dalgety Foods, Inc., Petitioner, v. Angelina Avina, Respondent.

To the Honorable Rose Elizabeth Bird, Chief Judge, and to the Associate Judges of the Supreme Court of the State of California:

Upon receipt of the Petition for Rehearing of DALGETY FOODS on the grounds that they did not receive a copy of our Petition, the undersigned reviewed the file in this matter (Mr. Lombardo, who has been handling this case, is out of the office), and according to our file, in addition to sending a copy of the Petition at the time of filing, copies of the Petition were again sent on December 18, 1981, and again by certified mail on January 3, 1982.

In reviewing the file, it also appears that there was extensive briefing filed in prior Petitions to the Court of Appeal. Therefore, this honorable Court had before it and available briefs of Respondent DALGETY. Accordingly, their arguments have been considered and there would be no purpose served by granting a rehearing.

Finally, the granting of the Petition and transfer to the Court of Appeal for a hearing does not constitute a decision on the merits. Respondent DALGETY will have an opportunity to present and argue its position to the Court of Appeal, so they have not been prejudiced by the granting of a hearing.

For the foregoing reasons, Respondent requests that the Petition for Rehearing be denied.

DATED: January 6, 1982

Respectfully submitted,

RUCKA, O'BOYLE & LOMBARDO
A Professional Corporation

By /s/ N. Michael Rucka
N. MICHAEL RUCKA

Attorneys for Respondent AVINA

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF MONTEREY

I am a citizen of the United States and employed in the County of Monterey; I am over the age of eighteen years and not a party to the within action; by business address is:

245 West Laurel Drive
Salinas, California 93906

On January 6, 1982, I served the within RESPONSE TO PETITION FOR REHEARING on the parties named below in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Salinas, California, addressed as follows:

Michael B. Margolis, Esq.
Littler, Mendelson, Fastiff
& Tichy
2049 Century Park East, #1660
Los Angeles, CA 90067

Court of Appeal
First Appellate District, Div. Two
4154 State Bldg., Civic Center
San Francisco, CA 94101

Honorable William R. Butler
Workers' Comp. Appeals Board
21 W. Laurel Dr., Suite 69
Salinas, CA 93901

Mission Insurance Co.
P.O. Box 5219
San Jose, CA 95150

Workers' Comp. Appeals Board
Reconsideration Dept.
455 Golden Gate Ave.
San Francisco, CA 94102

State Comp. Insurance Fund
P.O. Box 759
San Jose, CA 95106

Hartford Insurance Co.
P.O. Box 5086
San Jose, CA 95150

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Marilyn M. Sykes
Marilyn M. Sykes

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1983

Office - Supreme Court, U.S.
FILED
JUL 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2116

In The

Supreme Court of the United States

October Term, 1982

DALGETY FOODS, INC.,

Appellant,

vs.

ANGELINA AVINA,

Appellee.

APPELLEE'S MOTION TO DISMISS OR AFFIRM

N. Michael Rucka, Esq.
Alfred Lombardo, Esq.
T. Kirk McBride, Esq.
Ann Smith, Certified Law Student
Rucka, O'Boyle & Lombardo
A Professional Corporation

245 West Laurel Drive
Salinas, CA 93906
Telephone No. (408) 443-1051

Attorneys for Appellee

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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CALIFORNIA LABOR CODE, SECTION 132a

It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment.

(1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because the latter has filed or made known his intention to file an application with the appeals board, or because the employee has received a rating, award or settlement, is guilty of a misdemeanor and subject to the provisions of Section 4553. Any such employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.

(2) Any insurance carrier who advises, directs or threatens an insured under penalty of cancellation or a raise in premium or for any other reason, to discharge an employee because the latter has filed or made known his intention to file an application with the appeals board, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and subject to the provisions of Section 4553.

(3) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because the employee testified or made known his intention to testify in another employee's case before the appeals board is guilty of a misdemeanor, and the employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.

(4) Any insurance carrier who advises, directs or threatens an insured under penalty of cancellation or a raise in premium or for any other reason, to discharge or in any manner discriminate against an employee because the employee testified or made known his intention to testify in another employee's case before the appeals board is guilty of a misdemeanor.

Proceedings under this section for increased compensation as provided in Section 4553, or for reinstatement and reimbursement for lost wages and work benefits, are to be instituted by filing an appropriate petition with the appeals board, but such proceedings may not be commenced more than one year from the discriminatory act or date of termination of the employee. The appeals board is vested with full power, authority, and jurisdiction to try and determine finally all the matters specified in this section subject only to judicial review, except that the appeals board shall have no jurisdiction to try and determine a misdemeanor charge. The appeals board may refer and any worker may complain of suspected violations of criminal misdemeanor provisions of this section to the Division of Labor Standards Enforcement, or directly to the office of the public prosecutor.

No. 82-2116

In The

Supreme Court of the United States

October Term, 1982

DALGETY FOODS, INC.,

Appellant,

vs.

ANGELINA AVINA,

Appellee.

APPELLEE'S MOTION TO DISMISS OR AFFIRM

To The Honorable Justices of the United States Supreme Court:

Pursuant to this Court's Rule 16, Appellee Angelina Avina ("Mrs. Avina") hereby files this motion to dismiss the appeal filed by Appellant Dalgety Foods, Inc. ("Dalgety") on the grounds that it does not present a substantial federal question requiring plenary consideration and on the further grounds that the judgment of the California Court of Appeal rests on an adequate non-federal basis. In the alternative, Appellee asks this Court to affirm the judgment of the California Court of Appeal.

Appellant presents four questions to this Court on appeal and asks this Court to accept review of its fourth question (whether its right to due process was violated) as if it were presented in a petition for certiorari under 28 U. S. C. § 1257(3). Appellee asks this Court, therefore, to treat her motion to dismiss or affirm as if it were a brief in opposition to a petition for writ of certiorari as to this fourth question.

I.

SUMMARY OF FACTS AND CASE

Mrs. Avina was originally hired in 1968 by Spiegle Foods, Inc., the predecessor in interest to Dalgety. She continued to work seasonally at Dalgety as a conveyor belt worker and produce sorter until 1979. In 1976, she had a knee injury that led her to file a workers' compensation claim.

Her 1979 employment at Dalgety commenced on March 8. She was injured in a non-industrial fall on July 10, 1979 and was forced to stop working temporarily. While off work, on July 16, 1979, her workers' compensation action ended with a Compromise and Release payment from the Mission Insurance Company to Mrs. Avina of $22,628.80. On September 7, 1979, she presented to Dalgety a medical release, signed by her physician, which authorized her to return to her former work. Dalgety refused to rehire her and notified her in writing that her employment was terminated. Mrs. Avina then sought,

and eventually found, similar employment with another company.

Mrs. Avina's union at Dalgety initiated a grievance procedure in accord with the relevant Collective Bargaining Agreement to contest her discharge. An arbitration culminated that procedure. The arbitrator upheld Mrs. Avina's discharge on the grounds that it had been neither arbitrary nor capricious and therefore did not violate the Collective Bargaining Agreement.

Simultaneous to the grievance procedure, Mrs. Avina filed a claim with the California Workers' Compensation Appeals Board (hereinafter "WCAB") alleging facts indicating that her discharge was a response by Dalgety to her Workers' Compensation settlement and that it therefore was in violation of California Labor Code § 132a. The workers' compensation judge found in favor of Mrs. Avina. Dalgety petitioned for reconsideration to the WCAB. The WCAB interpreted the case of *Western Electric Company v. WCAB,* 99 Cal. App. 3d 629, 160 Cal. Rptr. 436 (1979) as holding that an employer's good faith belief, even if mistaken, that an employee's physical condition presented a danger to the work place was sufficient to remove the discharge of that employee from the reach of § 132a. Since the workers' compensation judge had accepted Dalgety's belief that Mrs. Avina was a danger to the work place as genuine, the WCAB upheld the discharge.

Mrs. Avina unsuccessfully petitioned the WCAB for reconsideration of that decision. She likewise unsuccessfully petitioned the California Court of Appeal for a Writ of Review. Upon further appeal, the California Supreme

Court granted a hearing to Mrs. Avina and ordered the Court of Appeal to entertain such a writ and to consider the *Western Electric Company* case. Dalgety then petitioned the California Supreme Court for a rehearing on the grounds that Dalgety had not been timely served with Mrs. Avina's Petition for Hearing. This petition was dismissed. The Court of Appeal then issued an opinion stating that Mrs. Avina had clearly demonstrated an ability to resume her work and remanding the case to the WCAB for further proceedings.

Dalgety petitioned the Court of Appeal for a rehearing on the grounds *inter alia* that the court had not addressed its federal preemption and collateral estoppel defenses. In rejecting that petition, the Court of Appeal modified its earlier opinion by stating that an arbitrator's decision that an employee's dismissal was consistent with a collective bargaining agreement does not bind either the WCAB or the Court of Appeal in a § 132a action. Dalgety then unsuccessfully petitioned to the California Supreme Court for a hearing on the same grounds.

In its Decision After Remittitur, the WCAB decided that further proceedings were unnecessary and reinstated the workers' compensation judge's original decision in favor of Mrs. Avina. Dalgety petitioned for reconsideration, again on the grounds of federal preemption and collateral estoppel. The WCAB denied that petition. The Court of Appeal dismissed Dalgety's subsequent Petition for Writ of Review, brought on the same grounds. The California Supreme Court likewise denied a hearing on those grounds. Dalgety here appeals the Court of Appeal's rejection of its collateral estoppel and federal pre-

emption contentions and requests consideration of the contention that its due process rights were violated when, as it alleges, it was not timely served with Mrs. Avina's original Petition for Hearing to the California Supreme Court.

Mrs. Avina hereby moves to dismiss or affirm for the reasons that follow.

II.

California Labor Code §132a Embodies An Important Public Policy In Protecting Industrially Injured Workers Against Discrimination.

A. This Court's reasoning in Alexander v. Gardner-Denver Company, 415 U. S. 36 (1974) and in Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U. S. 728 (1981) is applicable to this case.

Dalgety contends that there was a dispositive factual finding in the arbitration of Mrs. Avina's discharge to which preclusive effect must be given under traditional collateral estoppel principles. Mrs. Avina submits, however, that the same careful reasoning which led this court to its decisions in *Alexander, supra,* and *Barrentine, supra,* when applied to the instant case, supports the California Court's denial of preclusive effect when it heard her Section 132a claim.

In *Alexander, supra,* the Gardner-Denver company discharged Mr. Alexander, a black employee. The collective bargaining agreement in effect included both a management right to discharge for "proper cause" and a prom-

ise of no discrimination against any employee on account of race. Alexander submitted his claims of unjust discharge and racial discrimination to final and binding arbitration and lost. He then filed an action in Federal District Court alleging his discharge resulted from a racially discriminatory employment practice in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The Tenth Circuit Court of Appeals affirmed the District Court's grant of Gardner-Denver's summary judgment motion on the ground that Alexander's claim was precluded by the adverse arbitration. This court granted certiorari and reversed.

In *Barrentine, supra,* Mr. Barrentine presented a wage claim to a joint grievance committee for final and binding decision under a collective bargaining agreement. The claim was rejected and he filed suit in Federal District Court over the same wage claim alleging compensability under the Fair Labor Standards Act, 29 U. S. C. § 201, *et seq.* The Eighth Circuit Court of Appeals upheld the District Court's refusal to address the merits of the claim on the ground that it was barred by the adverse arbitration. This Court granted certiorari and reversed.

Dalgety suggests that this Court decided *Alexander* and *Barrentine* as it did only because conflicting federal labor policies were involved and that its decision would and should be otherwise when a *state* law conflicts with the national policy favoring arbitral finality.

Mrs. Avina submits that the crucial factor is not whether two federal policies or statutes are involved but whether a statute is involved, be it federal or state, which embodies minimum substantive guarantees for individual

workers and reflects an important public policy. What follows is an application of this Court's reasoning in *Alexander* and *Barrentine* to the alleged conflict between Section 132a of the California Labor Code and the policy of arbitral finality.

1. Legislative Intent.

The California Legislature declared in Section 132a: "It is the policy of this State that there should not be discrimination against workers who are injured in the course and scope of their employment." Such discrimination is a misdemeanor and subject to economic sanctions. Section 132a provides a minimum substantive guarantee against employment discrimination to workers who are industrially injured and assures them open access to administative and judicial forums. While seeking redress of a personal injury from discrimination, a worker also vindicates an important public policy. Its vindication in fact depends upon such litigation by individual workers. The statute on its face does not provide that a prior arbitral decision forecloses a worker's right to relief. To the contrary, it vests "full power, authority, and jurisdiction" in the appeals board to try and determine a worker's claim.

Section 132a is a law of general application and applies with equal force to employers who are parties to collective bargaining agreements and to those who are not. If the position urged by Dalgety is adopted, the same kind of conduct might result in a misdemeanor charge and economic penalty against an employer who is not party to a collective bargaining agreement and no sanction whatsoever against an employer who is. An employer with superior bargaining strength could effectively relieve him-

self by private contract of his public duty under Section 132a and its purpose would be nullified.

2. Separate Statutory and Contractual Rights.

Section 132a gives an individual employee statutory rights which are distinctly separate from his contractual rights. An arbitrator's decision is a final and binding resolution of contractual rights only. The employee's statutory rights are not waived prospectively by signing a labor contract or resorting to the arbitral forum even though the same factual occurrence may implicate both the contractual and statutory rights.

In *Judson Steel Corp. v. Workers' Compensation Appeals Board* (1978) 22 C. 3d 658, the California Supreme Court declared that the protection against discrimination afforded by Section 132a is not one susceptible of "loss" or "waiver" through collective bargaining:

> Moreover, it is clear in any event that an employer may not defend a discriminatory employment practice, prescribed by Section 132a, on the basis of the provision of a collective bargaining agreement, for a union may no more bargain away its members' statutory rights against discrimination under the workers' compensation law than it may bargain away its members' statutory rights against, for example, sexual or racial discrimination. As the Court held in *Robinson v. Lorillard Corp* (citation omitted): "The rights assured by Title VII are not rights which can be bargained away—either by a union, an employer or by both acting in concert".

Id. at 665, fn. 5.

3. Limitations of Arbitral Forum.

An arbitrator is confined to interpreting and applying the terms of a private contract. The mechanics of

arbitration are simple and technicalities avoided. Lawyers, transcripts and briefs are not the normal fare in arbitration. Formal rules of evidence and procedure do not apply. Unlike decisions of the Workers' Compensation Appeals Board which are subject to judicial review, the decision of an arbitrator is final and even an arbitrator's error of fact or law is not grounds for the court to vacate his award.

4. Illusory Threat to Arbitral Institution.

The threat to the continued vitality of the arbitral institution if a worker pursues both his contractual and statutory remedies is illusory. The *quid pro quo* for an arbitration clause is a no strike clause. In light of the benefits to the employer from such a pledge, it is improbable that the detriment of double vexation in defending a Section 132a claim would undermine his incentive to seek an arbitral solution to the broad range of disputes which arise from the labor-management relationship.

5. No Burden on Judicial System.

The California Legislature has established an expert administrative agency to enforce the workers' compensation laws including 132a, with judicial review available. No burden is imposed on the state or federal judiciary by denying preclusive effect to arbitration.

6. Overriding State Interest.

Any slight adverse impact on the arbitral institution or the national policy favoring arbitral finality is far outweighed by the overriding state interest in preventing discrimination against the industrially injured. Section 132a guarantees an individual worker the type of "fundamental

right" which the dissent in *Barrentine* agreed justified the co-existence of contractual and statutory remedies: the fundamental right of "a workplace free from *discrimination,* racial and otherwise". 450 U. S. 728, 749 (emphasis in original).

7. Tenth Circuit Agrees.

The Tenth Circuit Court of Appeals in *Peabody Galion v. Dollar,* 666 F.2d 1301 (1981) allowed workers to maintain an action in diversity based on an Oklahoma statute which prohibits the discharge of an employee for filing a workers' compensation claim even though some of the workers had arbitrated and lost their claims of wrongful discharge based on the labor contract. The court specifically rejected Dalgety's notion that the rationale of *Alexander* and *Barrentine* is viable only when two federal policies are involved:

> In the instant case it is true that the independent remedy arises under state law rather than federal. We hold, however, that that does not constitute a distinguishing factor.

Id. at 1321

8. Oregon Supreme Court Agrees.

The Oregon Supreme Court in *Vaughn v. Pacific Northwest Bell Telephone Company,* 611 P.2d 281 (1980) found this Court's decision in *Alexander* to be helpful by analogy in resolving a challenge to a state statute based on a "presumption of exclusivity" of arbitration. The court held that this "presumption" can be overcome by evidence of an independent statutory scheme such as Oregon's state statute making it an unlawful employment prac-

tice to discriminate against a worker who applies for compensation benefits. A worker has a personal cause of action under this statute which, the court concluded, manifests the legislature's intent to afford an alternative or supplemental remedy to that provided by a collective bargaining agreement and overrides the preexisting policy in favor of exclusivity of arbitration. In accord, *Ivery v. U. S.*, 686 F.2d 410 (1982), cert. denied, 51 U.S.L.W. 3684 (1983) (although a statutory policy might provide an exception to the general rule favoring finality of arbitration, the Federal Tort Claims Act is not a statute which provides minimum substantive guarantees nor does it create a new cause of action in an individual worker.)

9. Restatement Agrees.

Dalgety cites the Restatement (Second) of Judgments, Section 84 as authority for the proposition that collateral estoppel normally should apply to factual issues determined in procedurally fair arbitrations. In its comments to Section 84, however, the authors note many exceptions and qualifications to the general rules of claim and issue preclusion:

> A dispute may be governed by an arbitration agreement but also be subject to statutory provisions for alternative or supplementary procedures. The conclusive effect of an arbitration award is subordinate to such provisions. . . . A similar limitation may be implied from the arbitration agreement, particularly if the effect of treating such an award as issue preclusive may be to complicate future arbitrations of the same kind.

Comments f and g.

III.

The Doctrine Of Collateral Estoppel Is Inapplicable To This Case.

A. The Arbitrator's Decision Does Not Collaterally Estop the Judicial Consideration of Different Issues Relating To A § 132a Action.

Mrs. Avina further contends that the doctrine of collateral estoppel is inapplicable to her case. The gist of Dalgety's collateral estoppel argument is a contention that the arbitrator decided that Mrs. Avina was a danger to the work place and that the workers' compensation judge was bound by that decision. However, as detailed below, (1) the issue before the arbitrator was whether defendant had acted arbitrarily or capriciously and not whether Mrs. Avina was a danger to the work place; (2) any decision the arbitrator may have made on the "danger to the work place" issue was therefore dicta and not binding on the workers' compensation judge; and (3) the issue before the WCAB involved whether Dalgety's conduct had passed a standard beyond merely being non-arbitrary and non-capricious.

B. The Issue Before The Arbitrator Was Merely Whether Dalgety Acted Arbitrarily Or Capriciously In Discharging Mrs. Avina.

The first sentence of the arbitrator's "decision and award" reads as follows: "The question before the arbitrator is 'Was Angelina Avina discharged for cause within the meaning of the collective bargaining agreement?' ". Appellant's Appendix G at 156. In their Post-Hearing Brief, dated December 26, 1979, counsel for

Dalgety states that "the contract requirement of 'sufficient cause' for discharge would be satisfied by all but the most outrageously unjust discharges." Counsel for Dalgety also cited extersive authority for its argument that a discharge must be upheld absent evidence that it stemmed from "arbitrary, capricious, or discriminatory intent." Appellant's Appendix F at 140-142.

The language of the arbitrator's "decision and award" indicates his agreement that the "arbitrary or capricious" standard was appropriate in arbitration of a discharge not based on misconduct or malfeasance. The "decision and award" reads in its entirety as follows:

> It is the conclusion of the Arbitrator that the company did not violate the collective bargaining agreement, was not arbitrary or capricious in reaching its decision; therefore, the Arbitrator is compelled to deny the grievance and sustain the discharge.

Appellant's Appendix G at 164.

Mrs. Avina's union elected not to seek judicial review of the arbitrator's decision in favor of Dalgety. Thus, it is now undisputed that the arbitrator used an "arbitrary or capricious" standard as the measure of whether Dalgety violated the collective bargaining agreement in discharging Mrs. Avina.

C. Any Decision The Arbitrator May Have Made Regarding The "Danger To The Work Place" Issue Was Dicta And Not Binding In A Later § 132a Action.

In the pages preceding the "decision and award," the arbitrator discussed the prospectives of the union and Dalgety. Specifically, he indicated: (1) that Mrs.

Avina had suffered a series of injuries; (2) that her past injuries might cause her to be subject to future injuries if not careful; (3) that her back, wrist, and knee problems might not get better and might well get worse; (4) that the physical demands of the job presented difficulties for her; and (5) that years of manual labor might reduce her productive life. Appellant's Appendix G. Dalgety contends that these points amount to a finding by the arbitrator that Mrs. Avina was a danger to the work place. Without considering that contention on its merits, Mrs. Avina submits, as explained above, that the arbitrator's mission was merely to decide whether Dalgety's decision that Mrs. Avina constituted a danger to the work place was arbitrary or capricious. As the workers' compensation judge noted in his "Recommendation of Petition for Reconsideration:" "under the ruling of the arbitrator, the good faith of defendants at the time of the discharge was a defense." The arbitrator clearly decided that Dalgety genuinely believed Mrs. Avina to be a danger to the work place. As Dalgety successfully contended at arbitration, this good faith belief alone justified the discharge of Mrs. Avina under the collective bargaining agreement in that it demonstrated that Dalgety acted neither arbitrarily nor capriciously. Any opinion that the arbitrator may have expressed as to whether Dalgety's belief met a further and more demanding standard such as "objective correctness" was unnecessary to completion of his mission and therefore was dicta. The dicta contained in an arbitrator's decision, of course, is not protected by the doctrine of collateral estoppel in a subsequent civil litigation. Therefore, even should this court agree that the arbitrator found Mrs. Avina to be a danger to the work place, that finding was not binding

on the workers' compensation judge in a subsequent § 132a action.

D. The Issue Before The Workers' Compensation Judge Was Not Limited To Whether Dalgety Had Acted Arbitrarily Or Capriciously.

The ultimate issue before the workers' compensation judge, and subsequently the WCAB and the reviewing courts, was whether Dalgety's discharge of Mrs. Avina violated § 132a. Each tribunal elected to frame that issue in terms of a threshold issue. As discussed below, the respective tribunals differed in their framing of that threshold issue.

Mrs. Avina has consistently maintained that the threshold issue before the workers' compensation judge was simply whether or not Dalgety singled her out for investigation in a reaction to her workers' compensation settlement. In *Judson Steel Company v. WCAB,* 22 Cal. 3d 658, (1978), the California Supreme Court held that § 132a prohibits discrimination *in any manner* by an employer against an industrially injured employee on the basis of the employee's injury. In the present case, the workers' compensation judge's "minutes of hearing" recounts the testimony of a Dalgety executive in which he admits that he initiated the investigation of Mrs. Avina in reaction to the size of her workers' compensation award. Assuming that the relevant threshold inquiry is whether Mrs. Avina was singled out for investigation, this testimony is dispositive.

The workers' compensation judge assumed that Dalgety genuinely believed that Mrs. Avina was a danger

to the work place. However, he held this belief to be irrelevant to the § 132a action and went on to frame two threshold issues, each in accord with *Western Electric Company, supra.* First, he considered whether Mrs. Avina had demonstrated whether she could return to work without risk of re-injury. Upon deciding that she had so demonstrated, the judge considered whether Dalgety had rebutted the inference, drawn as in *Western Electric,* that its discharge of Mrs. Avina was discriminatory. The judge concluded that Dalgety had not rebutted that presumption.

The WCAB, in its final decision in favor of Mrs. Avina, reinstated the workers' compensation judge's decision, thereby adopting his issue formulation.

The Court of Appeal likewise assumed that Dalgety believed in good faith that Mrs. Avina was a danger to the work place. The court framed the threshold issue as whether that good faith belief should have been given "credence" by the WCAB. After application of the two-part test of *Western Electric,* considered above, the court concluded that Dalgety's good faith belief was unsupportable.

While, as discussed above, the various tribunals have differed in the framing of the threshold issue, none has adopted Dalgety's contention that the "arbitrary or capricious" issue should be considered in the § 132a action. This court has stated in *Montana v. U. S.,* 440 U. S. 147, 153:

> Under collateral estoppel, once an issue is actually and *necessarily* determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action in-

volving a party to the prior litigation. (Emphasis added.)

The issue of whether Mrs. Avina was in fact a danger to the work place was not necessary to the arbitrator's mission. No tribunal has adopted Dalgety's contention that any decisions the arbitrator may have made on issues not properly before him should be dispositive of issues presented in a workers' compensation action. The contention is without merit.

IV.

California's Overriding State Interest In Protecting Injured Workers Against Discrimination Is An Exception To The General Rule Of Preemption.

Dalgety contends that the liability imposed on it by application of Section 132a violates federal law in two respects: First, because granting Mrs. Avina relief under Section 132a "nullifies the results of collective bargaining;" and second, because Mrs. Avina's claim is pre-empted by the jurisdiction of the National Labor Relations Act since Dalgety's conduct is "arguably prohibited or protected" by the Act. Both contentions are without merit.

A. The Results Of Collective Bargaining Are Not Nullified Since The Protection Of § 132a May Not Be Bargained Away.

Dalgety contends that Section 132a has given Mrs. Avina "that which was bid for, but lost, in the collective bargaining process."

The California Supreme Court has said that the protection against discrimination afforded to an individual

worker by Section 132a is not one susceptible of "loss" or "waiver" through the collective bargaining process. *Judson Steel Corp., supra,* at 655, fn. 5.

The arbitrator's decision that Dalgety did not breach its contractual duty to Mrs. Avina does not absolve it from a breach of the duty imposed on all employers by Section 132a. This limitation imposed on the solutions reached by private parties to collective bargaining agreements is justified by the state's compelling interest in protecting its industrially injured workers against discrimination.

Moreover, the split of authority on this issue to which Dalgety points is illusory. The Tenth Circuit in *Peabody Galion, supra,* and the Oregon Supreme Court in *Vaughn, supra,* concluded that state workers' compensation statutes similar to Section 132a are not preempted by federal labor law. Dalgety cites the Hawaii Supreme Court's decision in *Gouveia v. Napili-Kai, Ltd.,* 649 P.2d 1119 (1982) and the Texas Court of Civil Appeals' decision in *Thompson v. Monsanto Co.,* 559 S.W.2d 873 (1977) as evidence of a conflict.

In *Gouveia,* a worker initiated an unfair labor practice charge under the NLRA for wrongful discharge. The claim was settled under the aegis of the NLRB and the worker was "made whole." When this same worker brought a state action for intentional infliction of emotional distress based on the discharge, the Hawaii Supreme Court dismissed the complaint on the ground of federal preemption. After reviewing the exceptions to the general rule of preemption, the court concluded that Gouveia had not pleaded facts sufficient to create an overriding state interest in protecting him. Notably, the court granted Gouveia leave to amend his pleading upon remand.

The Texas court in *Thompson, supra,* concluded that its state statute forbidding an employer to discriminate against an employee who pursues a workers' compensation remedy is preempted by federal law. The approach of the Texas courts as revealed in *Thompson* and thereafter in *Spainhouer v. Western Electric Company, Inc.*, 615 S. W. 2d 190 (1981), is to allow the statutory remedy only to an employee who bypasses entirely or stops short of exhausting a contractual grievance and arbitration procedure.

The short answer to the contention that the Texas decision represents a "conflict" is that each state must evaluate its own legislation and interests in light of important national labor policies. The fact that its workers' compensation scheme might not represent an overriding state interest to Texas does not make California's interest any less compelling. There is ample authority based on this Court's past applications of the doctrine of preemption to support the judgment of the California Court of Appeal.

B. § 132a Is Not Preempted By The NRLA Since It Represents A State Interest "Deeply Rooted In Local Feeling And Responsibility".

Dalgety asserts that a state statute which attempts to regulate conduct "arguably prohibited or protected" by the National Labor Relations Act is preempted by federal law. This statement is not supported by the history of judicial applications of the preemption doctrine which reveals an avoidance of any inflexible or mechanical application of the doctrine. The Tenth Circuit in *Peabody Galion, supra,* stated it this way:

> . . . the preemption doctrine is not turned on by simply shouting preemption or by pressing a button.

Id. at 1341.

1. General Rule of Preemption and Its Exceptions.

The general rule of preemption was set forth by the United States Supreme Court in *San Diego Building Trades v. Garmon,* 359 U.S. 236 (1959). The *Garmon* court recognized that there had been and would be exceptions to its general rule in appropriate classes of cases, and the courts have accordingly refused to apply the preemption doctrine to activity that might otherwise fall within the scope of *Garmon*—that is, activity arguably subject to Section 7 or Section 8 of the NLRB if that activity "was a merely peripheral concern of the LMRA. . . . or touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act". Id., at 243-244. E.g., *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966) (malicious libel action not preempted); *Farmer v. Carpenters,* 430 U.S. 290 (1977) (intentional infliction of emotional distress action not preempted); *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180 (1978) (state trespass statute not preempted).

Similarly, preemption does not apply "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes". *Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971).

In the *Farmer* case, this Court held that a union member who alleged his union had engaged in a campaign of personal abuse and harassment against him, could main-

tain an action for damages for the intentional infliction of emotional distress. One aspect of the alleged harassment was discrimination by the union in hiring hall referrals. Although such discrimination was arguably prohibited by Sections 8(b) (1) (A) and 8(b) (2) of the NLRA and thus an unfair labor practice, this Court permitted the state cause of action to proceed despite the risk that it would touch on an area of primary federal concern and interfere with the federal scheme of regulation. This Court identified two principal factors which warranted its departure from the general rule of preemption: (i) the substantial state interest in protecting its citizens from the challenged conduct; and (ii) a finding that the exercise of state jurisdiction over the tort claim entailed insufficient potential for interference with the regulatory jurisdiction of the NLRB to counterbalance the legitimate and substantial interest of the state. The *Farmer* court cited with approval its statement in *Vaca v. Sipes,* 386 U. S. 171 at 180 (1967) that the "decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interest being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies."

The *Linn* case, *supra,* further illustrates this point. A management employee sued a union for defamation based on statements made during an organizational campaign. If unfair labor practice charges had been filed, the Board might have found that the union violated Section 8 of the NLRA. Under a formalistic application of the *Garmon* rule, the defamation action could have been preempted. However, a number of factors influenced this

Court to depart from the general rule. First, the Court noted that the underlying conduct, that is, the intentional circulation of defamatory material known to be false, was not protected under the NLRA and there was thus no risk that the state would regulate conduct which Congress intended to protect. Second, the Court recognized that there was "an overriding state interest" in protecting its residents from malicious libels and that this interest was "deeply rooted in local feeling and responsibility" such that it fit within the exceptions specifically noted in *Garmon*. Third, the Court reasoned that there was little risk that the state cause of action would interfere with the effective administration of national labor policy as the exercise of state jurisdiction would be a "merely peripheral concern of the LMRA."

2. Section 132a Represents An Overriding State Interest.

As more fully argued above, the State of California has expressed its substantial interest in the welfare of workers who suffer industrial injuries by enacting a comprehensive workers' compensation scheme. Application of the *Garmon-Farmer-Linn* analyses does not require invalidating a vital aspect of this scheme. Section 132a reflects a state interest properly characterized as "deeply rooted in local feeling and responsibility" and fits within the express exceptions carved out by *Garmon*. Even if Dalgety is correct in contending that its conduct is "arguably prohibited or protected" under the NLRA (a contention that will be addressed below), the potential for interference with the regulatory jurisdiction of the NLRB is insufficient to counterbalance this legitimate and substantial state interest. It should be noted that the federal

judiciary scheme itself recognizes the states' overriding interest and expertise in their workers' compensation laws by prohibiting the removal of suits from state courts which are based on these laws even when there is diversity between the parties. See 28 U. S. C. 1445(c).

3. Tenth Circuit Agrees.

In *Peabody Galion, supra,* the Tenth Circuit rejected the contention that an Oklahoma statute giving a worker a cause of action if discharged for filing a workers' compensation claim is preempted by federal labor law. The court said the statute is in its nature remote from the NLRA and the collective bargaining agreement and in no way conflicts with them. After reviewing the cases in which this Court addressed the preemption question, the Tenth Circuit concluded:

> . . . the interests militating in favor of giving effect to the state law and holding that it is not an area of preemption are great. Workmen's compensation is preeminently a matter of state concern.

Id. at 1317.

4. Oregon Supreme Court Agrees.

It is an unlawful employment practice under an Oregon state statute to discriminate against an injured worker who applies for compensation benefits. The Oregon Supreme Court in *Vaughn, supra,* concluded that this statute is not preempted by federal law:

> The prevention of employment discrimination against workers receiving a state-administered compensation award is a matter of particular state responsibility and concern . . . the state has a substantial interest

in protecting the integrity of its workers' compensation system.

Id. at 287.

5. No Authority That Dalgety's Conduct Is "Arguably Prohibited Or Protected."

A finding that conduct is "arguably prohibited or protected" does not result in automatic preemption but rather is the predicate for a balanced inquiry as to the nature of the federal and state interests involved. If this necessary predicate is not established, there is no need to undertake such a balanced inquiry. If Dalgety's conduct is not emcompassed by the NLRA, there is no basis for a preemption argument.

Dalgety asserts that the NLRB has "suggested" in a "spate of recent decisions" (three) that its conduct is encompassed by the Act. The NLRB does not hold in the cases cited by Dalgety that the discharge of an employee for exercising his rights under workers' compensation laws is prohibited or protected by the NLRA. In fact, in *Grumman Flexible Corp.*, 264 N.L.R.B. No. 34 (9/28/82) the Board prefaced its finding that an employer had fired a probationary employee for a poor attendance record rather than from a desire to limit its workers' compensation liability by "assuming, *arguendo,* that the (employee's) request for workmans' compensation papers was 'protected activity'." See Appellant's Appendix HH at 464.

Dalgety cites no authority for its contention that employer conduct which violates Section 132a is "arguably prohibited or protected" by the NLRA. The Fourth Circuit in *Krispy Kreme Doughnut Corp. v. NLRB,* 635 F.2d 304 (1980) denied enforcement of a cease and desist

order requiring an employer to reinstate an employee with backpay. The court held that the discharge of an individual employee for filing a workmen's compensation claim did not violate Section 8(a) (1) of the NLRA since no protected "concerted" activity was involved. The court emphasized that such a finding is an essential predicate for the NLRB to take jurisdiction. Dalgety cites no NLRB decision during its 48-year history which declares the type of employer conduct challenged by Mrs. Avina to be an unfair labor practice under the Act and, of necessity without such a decision, cites no Appellate Court authority sustaining the NLRB's assertion of jurisdiction as within its statutory mandate.

6. No Genuine Conflict.

There is no genuine conflict among tribunals on this issue. The Fourth Circuit finds conduct similar to that of Dalgety's not to be "arguably prohibited or protected" by the NLRA. The Tenth Circuit, the Oregon Supreme Court, and the California Court of Appeal all agree that the doctrine of federal preemption does not invalidate a state workers' compensation statute such as Section 132a.

V.

The California Supreme Court Afforded Dalgety Full Opportunity To Respond To Mrs. Avina's Petition For Hearing; Dalgety's Due Process Argument Is Without Merit.

Mrs. Avina's Petition for Hearing to the California Supreme Court is dated December 2, 1981. Appellant's Appendix MM. Dalgety maintains that it received notice

of this petition only on December 18, 1981, and, as of the filing of its Petition for Rehearing on December 29, 1981, had not yet been served with a copy of Mrs. Avina's petition. The California Supreme Court granted Mrs. Avina's petition on December 23, 1981.

In her "Response to Petition for Rehearing", counsel for Mrs. Avina stated that Dalgety had been served the copy of the petition at the time it was filed, again upon the request of Dalgety's counsel on December 18, 1981, and a third time on January 3, 1982. Appellant's Appendix OO. Dalgety's failure to make a timely response to Mrs. Avina's petition was clearly due to its own oversight and not due to any refusal by the California Supreme Court to permit opposition to Mrs. Avina's petition. There was therefore no violation of Dalgety's due process rights.

Even assuming, *arguendo,* that Dalgety had not been timely served with Mrs. Avina's petition, Dalgety was not deprived of due process rights. Section 132a, collateral estoppel, and federal preemption arguments had previously been presented to the workers' compensation judge, the WCAB, and the Court of Appeal. After the Supreme Court directed the Court of Appeal to grant Mrs. Avina's petition for writ of review, Dalgety's arguments were again presented chronologically to the Court of Appeal, the California Supreme Court, the WCAB, the Court of Appeal again, and the California Supreme Court again. Dalgety's contention that the California courts "simply refused" to consider these arguments is a blatant misrepresentation. As noted above, the Court of Appeal issued a written opinion discussing Section 132a issues and modified that written opinion to include an express rejection

of the collateral estoppel and federal preemption arguments.

Dalgety asks this Court to accept review of its due process claim as if it were presented in a petition for certiorari. Mrs. Avina urges that this Court's discretion be exercised in favor of denying Dalgety's petition as no genuine and substantial question of constitutional law is presented.

———o———

VI.

CONCLUSION

The judgment of the California Court of Appeal conforms with this Court's decisions denying preclusive effect to arbitration when a statute embodying minimum substantive guarantees and important policy considerations offers a remedy to an individual worker. It likewise conforms with this Court's decisions carving out exceptions to the doctrine of federal preemption when overriding state interests are implicated.

The conflicts alluded to by Dalgety are illusory and no substantial federal questions are presented by its appeal. Dalgety, whose arguments have twice been presented to the California Court of Appeal and Supreme Court, has not been denied due process or an opportunity to be heard.

Mrs. Avina respectfully moves this court to dismiss the appeal or, in the alternative, to affirm the judgment of the California Court of Appeal, and further moves

this Court to deny Dalgety's petition for a writ of certiorari on its due process claim.

Dated: July 22, 1983.

N. Michael Rucka, Esq.
Alfred Lombardo, Esq.
T. Kirk McBride, Esq.
Ann Smith, Certified Law Student

Rucka, O'Boyle & Lombardo
A Professional Corporation

245 West Laurel Drive
Salinas, CA 93906
Telephone No (408) 443-1051

Attorneys for Appellee

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No. 82-2116

IN THE

Supreme Court of the United States

October Term, 1983

DALGETY FOODS, INC.,

Appellant,

vs.

ANGELINA AVINA,

Appellee.

On Appeal from a Judgment of the Court of Appeal of the State of California in Case No. A020025 (California Workers' Compensation Appeals Board Case Nos. 76 SAL 8071 and 77 SAL 9360)

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

GEORGE J. TICHY, II, ESQ.
MICHAEL B. MARGOLIS, ESQ.
Counsel of Record
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
1925 Century Park East
Suite 850
Los Angeles, CA 90067
(213) 553-0308

Attorneys for Appellant

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

I

INTRODUCTION

Appellee's Motion to Dismiss or Affirm ("Appellee's Motion") presents this Court with four putative reasons to affirm the judgment below.[1] First, Appellant argues that the exceptions to arbitral finality announced in *Gardner-Denver*[2] and *Barrentine*[3] should extend to all statutes,

[1]Although Appellee nominally asks for dismissal of the appeal as well, *see* Appellee's Motion at 1, dismissal is plainly inappropriate because Appellee does not dispute that 28 U.S.C. § 1257(2) gives this Court appellate jurisdiction to review the judgment below.

[2]*Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974).

[3]*Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981).

whether federal or state, which create substantive rights in individual employees. *See* Appellee's Motion at 6-7. Second, Appellee contends that collateral estoppel does not affect the judgment below because the arbitrator should have decided the case without reaching the safety issue. *See id.* at 12. Third, Appellee claims that federal preemption should not apply because California has an overriding local interest at stake. *See id.* at 17-23. Finally, Appellee declares that any prejudice suffered by Appellant in connection with the procedural fiasco in the California Supreme Court resulted from Appellant's own lack of due diligence. *See id.* at 26.

Appellant respectfully submits that none of these contentions justifies summary affirmance. To the contrary, Appellee's own arguments disclose the importance of the issues presented by the appeal and the need for this Court's guidance.

II
ARGUMENT

A. Gardner-Denver and Barrentine.

Appellee succinctly frames the question presented by this appeal about the scope of the *Gardner-Denver* and *Barrentine* exceptions to arbitral finality:

> [Appellant] suggests that this Court decided [*Gardner-Denver*] as it did only because conflicting labor policies were involved and that this decision would and should be otherwise when a state law conflicts with the national policy favoring arbitral finality.
>
> [Appellee] submits that the crucial factor is not whether two federal policies or statutes are involved but whether a statute is involved, be it federal or state, which embodies minimum substantive guar-

antees for individual workers and reflects an important public policy.

Appellee's Motion at 6-7.

Appellant respectfully submits that this dispute is not suitable for summary adjudication. For one thing, sensitive competing interests must be reconciled: federal arbitral finality wars with state self-determination; collective bargaining with individual employee rights. The exhaustive analysis that comes with this Court's plenary review would no doubt lead to an appropriate balance of these interests, but trusting to serendipity is surely unwise.

This is particulary true because an inappropriate balance would have highly undesirable results. Consider, for example, the effect of Appellee's proposed rule in a State where all "unjust" discharges were prohibited by statute. Appellee's rule would destroy the incentive for an employer to agree to arbitrate the propriety of discharges (why invite double jeopardy?) and would emasculate the federal policy promoting the resolution of industrial disputes through collective bargaining.

Appellant submits that federal labor policy should not be left to the regional whims of State legislators without this Court's plenary consideration of whether, or under what circumstances, that would be appropriate.

B. The Scope of the Arbitrator's Decision.

The dispositive issue in the Section 132a proceedings below was whether Appellee's continued employment did, as Appellant believed, present an undue safety risk. Appellant has argued that the arbitrator's decision collaterally estops Appellee on that issue. Appellee now claims that the arbitrator properly looked only at whether the discharge was arbitrary and capricious; he should not,

therefore, have decided the safety issue, and his findings on that issue were mere dicta which the tribunals below were free to ignore. *See* Appellee's Motion at 12.

Five defects destroy this argument. First, it is an appellate afterthought which was neither preserved by Appellee nor adopted as a rationale for the decision below. *See* Jurisdictional Statement at 6 n. 6. Second, it seizes on the phrasing of the formal concluding sentence of the arbitrator's relatively long opinion in defiance of the plain focus of the opinion itself. *Compare* Appendix G at 164-65 *with id.* at 157-64; *see* Jurisdictional Statement at 6 n. 6.

Third, even that precious phrasing does not justify Appellee's characterization. The sentence reads: "It is the conclusion of the Arbitrator that the Company did not violate the collective bargaining agreement, was not arbitrary or capricious in reaching its decision; therefore, the Arbitrator is compelled to deny the grievance and sustain the discharge." Appendix G at 164-65. Appellee's construction would have us replace the comma after "collective bargaining agreement" with the phrase "because the Company", amending the sentence to read: "the Company did not violate the collective bargaining agreement *because the Company* was not arbitrary or capricious in reaching its decision". That is a heavy load for a comma to carry; it might just as well mean "and" or some other conjunction, and its meaning can hardly be determined without reference to the preceding pages of discussion. Yet Appellee's entire case rests on that comma.

Fourth, Appllee's argument is internally inconsistent. If for collateral estoppel purposes the Court cannot look beyond the arbitrator's concluding sentence, as Appellee

contends while she attempts to circumnavigate the arbitrator's clearly expressed opinion on the safety issue, then the Court should not look beyond that conclusion to evaluate the arbitrator's position on any other issue. Yet Appellee herself argues in another context that "[t]he arbitrator clearly decided that Dalgety genuinely believed Mrs. Avina to be a danger to the work place." Appellee's Motion at 14.

Finally, the arbitrator himself clearly and repeatedly indicated that he considered the risk of injury to be the critical consideration. In fact, virtually his entire opinion is taken up with discussing the extent of injury and safety risk. To take one example, the arbitrator said:

> The Arbitrator has intensely considered the provisions of the collective bargaining agreement and the points made in Union counsel's brief. Casting aside, for the moment, the contract provisions and legal points at hand (although these are not being abandoned), the Arbitrator must also consider this matter in terms of its impact on Ms. Avina as a human being. The question arises: What will the impact and effect on her be if she is returned to her employment with the Company? . . . [F]or how long, in her circumstances, could she perform this work? . . . We do truly believe that manual labor of the type required on this job and, for that matter, any other type of job that may become available to Ms. Avina, will severely shorten the productive span of her life. *This Arbitrator has never been able to escape these considerations in matters of this kind.* The Arbitrator is also aware that many other arbitrators have considered injury matters from this point of view.

Appendix G at 163 (emphasis added); *see* Jurisdictional Statement at 6 n. 6.

In sum, the arbitrator plainly considered himself bound to determine the extent of the risk of injury presented by Appellee's continued employment. The record

contains no basis for rejecting the arbitrator's view. Appellant respectfully submits that, under these circumstances, the arbitrator's safety findings cannot be deemed mere dicta which were properly ignored by the tribunals below.

C. Overriding State Interest.

Appellee's third ground for summary adjudication is the claim that, even if federal law would otherwise make the arbitration decision dispositive of the Section 132a claim on the facts of this case, California's strong interest in regulating employment discrimination and workers' compensation matters overrides contrary federal law. *See* Appellee's Motion at 17-18, 22. The threshold infirmity in Appellee's argument is its tenuous relation to the decision below. Because no tribunal in this case ever explored the question of how Appellant's position might threaten interference with a legitimate state interest, the record is spare on this critical point.

Appellee herself advances two possibilities. First, she contends that Appellant's position would permit unionized, economically strong employers to remove themselves from Section 132a's reach despite the California Supreme Court's declaration in *Judson Steel*[4] that California's interest in protecting against employment discrimination precludes a collective bargaining agreement from immunizing an employer from Section 132a liability. *See* Appellee's Motion at 7-8. Appellee gives us this parade of horribles:

> If the position urged by Dalgety is adopted, the same kind of conduct might result in a misdemeanor charge and economic penalty against an employer who is

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[4] *Judson Steel v. Workers' Compensation Appeals Board*, 22 Cal. 3d 658, 150 Cal. Rptr. 250 (1978).

> not party to a collective bargaining agreement and no sanction whatsoever against an employer who is. An employer with superior bargaining strength could effectively relieve himself by private contract of his public duty under Section 132a and its purpose would be nullified.

Id.

But Appellee's parade ends in a blind alley. This appeal does not involve a collective bargaining agreement that purports to destroy employee rights under Section 132a. To the contrary, the contract at issue here expressly prohibits employment discrimination, including handicap discrimination, "as provided in the appropriate State . . . laws." Appendix A at 3; *see id.* at 5; *see also* Jurisdictional Statement at 5. Appellant contends not that its collective bargaining agreement exempts it from all liability under Section 132a, but rather that the factual issues dispositive of Appellee's Section 132a claim were decided in arbitration and that federal law requires California to honor the arbitrator's decision.

This brings us to Appellee's second claim of overriding state interest: "[Section 132a] on its face does not provide that a prior arbitral decision forecloses a worker's right to relief. To the contrary, it vests 'full power, authority, and jurisdiction' in the appeals board to try and determine a worker's claim." Appellee's Motion at 7. Thus, Appellee evidently contends that California has a compelling interest in having Section 132a issues determined exclusively in California tribunals. With this step, however, Appellee moves far past the position taken by the California Supreme Court in *Judson Steel, supra:* even that court acknowledged that, in a proper case, Section 132a litigation in a California tribunal might be pre-

empted by factually related proceedings before the National Labor Relations Board. *See* 22 Cal. 2d at 668 n. 8.[5]

Moreover, Appellee's argument proves too much. Either Appellee's notion of a compelling state interest in procedural exclusivity extends so far that it would deny collateral estoppel effect even to factual findings made by federal courts in the course of addressing issues of federal law or, if limited to arbitration decisions, it converts the compelling state interest argument into a mere recapitulation of Appellee's contention that the *Gardner-Denver* and *Barrentine* exceptions to arbitral finality should apply to state statutes. Appellant respectfully submits that, in either event, the step Appellee asks this Court to take should first be subjected to the Court's plenary consideration.

D. Due Process.

Appellee contends that the California Supreme Court did not deny Appellant due process because Appellant's "failure to make a timely response to [Appellee's successful] petition was clearly due to its own oversight and not to any refusal by the California Supreme Court to permit opposition to Mrs. Avina's petition." Appellee's Motion at 26.

Appellee's barb misses the mark.[6] Had the California Supreme Court considered the parties' evidence and ruled

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[5]It is useful to remember that the National Labor Relations Board itself frequently defers to arbitration under collective bargaining agreements. *See, e.g. Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

[6]Interestingly, Appellee herself cast doubt on whether the petition really was mailed to Appellant before the California Supreme Court granted it. Appellee tells this Court that, "[i]n her 'Response to [Appellant's] Petition for Rehearing [to the

(Continued on next page)

that Appellant's counsel lied when he claimed not to have received Appellee's petition, Appellant's due process claim would not arise. But the California Supreme Court did not dismiss Appellant's petition for rehearing as Appellee contends, *see* Appellee's Motion at 4; that court instead refused to accept Appellant's petition even for filing. *See* Jurisdictional Statement at 13 n. 12.

In other words, the California Supreme Court refused to allow Appellant even to *present* its claim that it had not been served with Appellee's successful petition. Why? Because the court believed that once it had granted the petition (in the absence of opposition) it lost jurisdiction over the matter. Can this Kafkaesque procedure comport with due process?

III

CONCLUSION

For the foregoing reasons, Appellant asks this Court to deny Appellee's Motion and grant plenary consideration of the questions presented by the appeal.

DATED: September 19, 1983.

Respectfully submitted,
GEORGE J. TICHY, II, ESQ.
MICHAEL B. MARGOLIS, ESQ.
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
Attorneys for Appellant

(Continued from previous page)

California Supreme Court],' counsel for Mrs. Avina stated that Dalgety had been served the copy of the petition at the time it was filed." Appellee's Motion at 26. In fact, however, Appellee's attorney said only that he "reviewed the file in this matter (Mr. Lombardo, who has been handling this case, is out of the office), and *according to our file,*" the petition had been mailed (presumably to Appellant). Appendix 00 at 535 (emphasis added).